Supreme Court, U.S.
FILED
01-215 AUG 02 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

MARION DIXON, *ET AL.*,

Petitioners,

v.

FORD MOTOR CREDIT COMPANY, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel
DAWN ADAMS WHEELAHAN
650 Poydras St., Suite 1550
New Orleans, LA 70130
(504) 522-0495 (Telephone)
(504) 581-1624 (Facsimile)

TERRY RICHARDSON, JR.
DONNI E. YOUNG
NESS, MOTLEY, LOADHOALT, RICHARDSON & POOLE
1555 Poydras St., Suite 1700
New Orleans, LA 70112
(504) 636-3480 (Telephone)
(504) 636-3499 (Facsimile)

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556-0780
(219) 631-5717 (Telephone)
(219) 631-4197 (Facsimile)
Blakey.1@nd.edu (E-mail)
Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1350

QUESTIONS PRESENTED FOR REVIEW

1. Is a RICO "scheme to defraud," where a consumer purchases credit life insurance, using standardized documents that unlawfully omit material information, tested by the standard "reasonably calculated to deceive persons of ordinary prudence and comprehension"?

2. Is the "materiality" of an omission in standardized documents in a RICO "scheme to defraud" sufficient to show "proximate cause," or must it necessarily be tested by "inducement and reliance"?

PARTIES TO THE PROCEEDINGS

PETITIONERS

Michelle James Orso
Leroy Perry
Kevin Duthu
Kevin Wells

RESPONDENTS

Chrysler Financial Corporation
Ford Motor Credit Company
Nissan Motor Acceptance Corporation
Louisiana Dealer Services Insurance, Inc.
First Assurance Life of America
American National Insurance Company
Crescent City Nissan East

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. Conflicting With Various Courts of Appeal and State Decisions, The Fifth Circuit's Decision Requires Review To Settle Recurring Questions In Nation-Wide Litigation Under Important Federal Statutes 6

Overview 6

A. The Fifth Circuit's "Ordinary Prudence" Standard For "Scheme to Defraud" Is Followed In Seven Circuits, But Is In Conflict With Three Circuits 7

B. The Fifth Circuit's Test For "Proximate Cause" Between A RICO "Scheme To Defraud" And Its Attendant "Injury" Is Followed In Two Circuits, But Is In Conflict With Seven Circuits. 9

Analysis 13

TABLE OF CONTENTS – Continued

Page

A. The Fifth Circuit's "Ordinary Prudence" Standard Cannot Be Justified By Text, Authority, Or Rationale..... 13

B. The Materiality Of An Omission, Where A Consumer Purchases A Product, Using Standardized Credit Documents That Unlawfully Omit Material Information, Is A Sufficient Nexus Between "Violation" and "Injury" In A RICO "Scheme To Defraud." 18

II. Mail Fraud And RICO Are Important Federal Statutes Whose Fairness And Effectiveness Are Undercut By Conflicting Decisions Of The Circuit Courts Of Appeal..... 26

Mail Fraud..... 26

RICO 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Young & Republican, Inc., 79 F.2d 234 (2nd Cir. 1996), *cert. denied*, 519 U.S. 816 (1996) 10

Advocacy Organization for Patients & Providers v. Auto Club Ins. Ass'n, 176 F.3d 315 (6th Cir.), *cert. denied*, 528 U.S. 871 (1999) 8

Affiliated Ute Citizens of Utah v. United States, 406 U.S. 152 (1972) 20, 24

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 28

All Care Nursing Service v. High Tech Staffing, 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999) 10, 20

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 25

American Society of Mechanical Engineers v. Hydro Level Corp., 456 U.S. 556 (1983) 25, 28

Angelico v. Lehigh Valley Hospital, Inc., 184 F.3d 268 (3rd Cir. 1999)..... 12

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) 27

Appletree Square I, Ltd. v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994)..... 10

Associated General Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters, 495 U.S. 519 (1983) 11, 18

Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986 (8th Cir. 1989).....10, 14

TABLE OF AUTHORITIES – Continued

Page

Badders v. United States, 240 U.S. 391 (1916) 15

Baker Bk. & Trust Co. v. Matthews, 401 So. 2d 1246 (CA 1st LA 1981).....12, 23

Bartlett v. State, 28 Ohio St. 669 (1876) 16

Basic, Inc. v. Levinson, 405 U.S. 224 (1988) 19

Bastian v. Petren Resources Corp, 892 F.2d 680 (7th Cir. 1990), *cert. denied*, 496 U.S. 906 (1990) 21, 26

BCCI Holding (Luxembourg), S.A. v. Khalil, 214 F.3d 168 (D.C. Cir.), *cert. denied*, 513 U.S. 958 (2000) 10

Bieter Co. v. Blomquist, 987 F.2d 1319 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993)..... 10

Bizer v. Globe Fin. Services, Inc., 654 F.2d 1 (1st Cir. 1981).....12, 22, 28

Blachly v. United States, 380 F.2d 665 (5th Cir. 1967) 8

Blue Cross & Blue Shield, United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 525 U.S. 1071 (1999)..... 12

Blue Shield of VA v. McCready, 457 U.S. 465 (1982) 28

Bohannon v. Wachovia Bk. & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936) 25

Brokerage Concepts, Inc. v. U.S. Health Care Inc., 140 F.3d 494 (3rd Cir. 1998)..... 8

Brown v. United States, 79 F.3d 1550 (11th Cir. 1996) 17

Brown v. Marquette Savings & Loan Ass'n, 686 F.2d 608 (7th Cir. 1982)..... 23

TABLE OF AUTHORITIES – Continued

Page

Bustamante v. First Federal Savings & Loan, 619 F.2d 360 (5th Cir. 1980) 23

Buford v. H & R Block, Inc., 168 F.R.D. 340 (S.D. Ga. 1996), *aff'd*, 117 F.3d 1344 (11th Cir. 1997) 5

Carpenter v. United States, 484 U.S. 19 (1987) 7, 15

Central Distributors of Beer, Inc. v. Conn., 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) 9

Cement Contractors Workers District Council Welfare Fund v. Lollo, 148 F.3d 194 (2nd Cir. 1988) 9

Chisolm v. Transouth Fin. Corp., 95 F.3d 331 (4th Cir. 1996) 9

Citizen State Bk. of Marshfield, Mo. v. F.D.I.C., 751 F.2d 209 (8th Cir. 1984) 23

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2nd Cir. 1999) 9, 22

Cox v. Administrator For United States Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994), *modified*, 30 F.3d 1347, *cert. denied*, 513 U.S. 1110 (1995) 10

Dixey v. The Idaho First Nat'l Bk., 766 F.2d 749 (9th Cir. 1983) 12

Deaver v. United States, 155 F.2d 740 (D.C. Cir.), *cert. denied*, 329 U.S. 766 (1946) 8

Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948) 26

Durland v. United States, 161 U.S. 306 (1896) 15

TABLE OF AUTHORITIES – Continued

Page

Dzadousky v. Lyons Ford Sales, Inc., 593 F.2d 538 (3rd Cir. 1979) 12

Ed Marling Stores Inc. v. Rich & Son, 6 Kan. App. 2nd 175, 627 P.2d 352 (1981) 23

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3rd Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990) 9, 25

Fasulo v. United States, 272 U.S. 620 (1926) 7, 16

Formax, Inc. v. Hostert, 841 F.2d 388 (Fed. Cir. 1988) 15

Gambarella v. G. Fox & Co., 716 F.2d 104 (2nd Cir. 1983) 23

Gibson v. Bob Watson Chevrolet-GEO, Inc., 112 F.3d 283 (7th Cir. 1997) 12

Grin v. Shine, 187 U.S. 181 (1902) 7, 14

H.J. Inc. v. Northwestern Bell Telephone Co., Inc., 492 U.S. 229 (1988) 27, 29

Herrera v. First Northern Savings & Loan Ass'n, 805 F.2d 896 (10th Cir. 1986) 12, 23

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 11, 18, 22, 25

Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737 (3rd Cir. 1996) 21

Ifill v. West, 1999 U.S. Dis. Lexis 21320 (S.D. N.Y. 1999) 9

In Re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144 (3rd Cir. 1993) 12

TABLE OF AUTHORITIES – Continued

Page

In Re EDC, Inc., 930 F.2d 1275 (7th Cir. 1991) 11, 22

Insolia v. Philip Morris, Inc., 216 F.3d 596 (7th Cir. 2000) 9

Int'l Travel Arrangers v. Western Airlines, 623 F.2d 1255 (8th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980) 12

Johnson Enterprises of Jacksonville, Inc. v. FPL Group Inc., 162 F.3d 1290 (11th Cir. 1998) 10

Jones v. Bill Heard Chevrolet, Inc., 212 F.3d 1356 (11th Cir. 2000) 13

John C. Holland Enter., Inc. v. J.P. Mascaro & Sons, Inc., 653 F. Supp. 1242 (E.D. Va. 1987), *aff'd without opinion*, 829 F.2d 1120 (4th Cir. 1987) 9, 22

Khurana v. Innovative Health Care Systems, Inc., 130 F.3d 143 (5th Cir. 1997), *vacated*, 525 U.S. 979 (1998), *dismissed*, 164 F.3d 900 (5th Cir. 1999) 11

Laborers Local No. 17 v. Philip Morris, Inc., 192 F.3d 223 (2nd Cir. 1999), *withdrawn* 191 F.3d 229, *cert. denied*, 120 S. Ct. 799 (2000) 10

Lifschultz Fast Freight Inc. v. Consolidated Freightway Corp. of Delaware D.S.C., 805 F. Supp. 1277 (D.C.S.C. 1992), *aff'd without opinion*, 998 F.2d (4th Cir.), *cert. denied*, 510 U.S. 993 (1993) 11

Linden v. United States, 254 F.2d 560 (4th Cir. 1958) 8

McNally v. United States, 483 U.S. 350 (1987) 26

Merchandise Nat'l. Bk. of Chicago v. Scanlon, 86 Ill. App. 3rd 719, 408 N.E. 2d 248 (1980) 12, 23

TABLE OF AUTHORITIES – Continued

Page

Metromedia Co. v. Fugazy, 983 F.2d 350 (2nd Cir. 1992), *cert. denied*, 508 U.S. 952 (1993) 21

Mid Atlantic Telecon, Inc. v. Long Distance Servs., Inc., 18 F.3d 260 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994) 9

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 20, 24

Mitchell v. Langley, 143 Ga. 827, 85 S.E. 1051 (1915) 25

Mobil Oil Exploration v. United States Distribution Co., 498 U.S. 212 (1991) 17

Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) 23

Murr Plumbing v. Scherer Bros. Fin. Servs. Co., 48 F.3d 1066 (8th Cir. 1995) 15

Mylan Laboratories, Inc. v. Matikari, 7 F.3d 1130 (4th Cir. 1993), *cert. denied*, 510 U.S. 119 (1994) 11

Nat'l. Ass'n. of Pharmaceutical Mfg. v. Ayerst Labs, 850 F.2d 904 (2nd Cir. 1988) 12

Neder v. United States, 527 U.S. 1 (1999) 7, 19, 24

Newton v. Tyson Foods, Inc., 207 F.3d 444 (8th Cir. 2000) 10

Oregon Laborers Employers Health & Welfare Trust Fund v. Research, Inc., 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) 10

Peek v. Gurney, L.R., 6 Eng. & In. App. 377 (1873) 24

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991) 5, 8, 10

TABLE OF AUTHORITIES – Continued

Page

Peters v. Lupient Oldsmobile Co., 220 F.3d 915 (8th Cir. 2000) 12, 23

Pfizer, Inc. v. India, 434 U.S. 308 (1978) 28

Ranson v. S & S Food Center, Inc. of Fla., 700 F.2d 670 (11th Cir. 1983).....13, 23

Roper v. Consurve, 578 F.2d 1106 (5th Cir.), *aff'd*, 445 U.S. 326 (1979) 19

Rotella v. Wood, 528 U.S. 549 (2000) 28

Rudisell v. The Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980) 13

SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963) 17

Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256 (2nd Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996) 9

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1984) 28

Shaw v. Rolex Watch, U.S.A., 726 F. Supp. 969 (S.D. N.Y. 1989) 9

Silverman v. United States, 213 F.2d 405 (5th Cir.), *cert. denied*, 348 U.S. 828 (1954) 3, 16

Simms v. Biondo, 816 F. Supp. 814 (E.D. N.Y. 1953) 17

Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3rd Cir. 1989)..... 22

Smith v. Greater Houston Bk., 580 S.W. 2d 165 (Ct. of Civ. App. 1st Dis. TX 1979).....12, 23

TABLE OF AUTHORITIES – Continued

Page

Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407 (7th Cir. 1980) 12, 23, 28

Spiegel v. Continental Illinois Natl. Bk., 790 F.2d 638 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986) 8

Standardbred Owners Ass'n v. Roosevelt Raceway Associates, 985 F.2d 102 (2nd Cir. 1993) 9

State v. Craig, 124 Kan. 340, 259 P.802 (1927) 20, 21

Steamfitters Local Union v. Philip Morris, Inc., 171 F.3d 912 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) 9

Steele v. Ford Motor Credit Co., 783 F.2d 1016 (11th Cir. 1986) 13, 23

Stout v. V.D. Byrider, 228 F.3d 709 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 1088 (2001) 13

Summit Properties, Inc. v. Hoechrist-Celanese Corp., 214 F.3d 556 (5th Cir.), *cert. denied*, 120 S. Ct. 896 (2001) 3, 18, 29

Super Chief Credit Union v. Gilchrist, 232 Kan. 40, 653 P.2d 117 (1982) 12

Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991), *modified*, 958 F.2d 1514, *cert. denied*, 506 U.S. 1021 (1992) 10, 22

Tech v. Hughes, 229 N.Y. 222, 128 N. E. 185 (1920) 29

TABLE OF AUTHORITIES – Continued

Page

Tel-Phonics Services, Inc. v. TBS Int'l, Inc., 975 F.2d 1134 (5th Cir. 1992) 29

Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir. 2001) 13, 23

United Health Care Corp. v. Am. Trade Ins. Co., Ltd., 88 F.3d 563 (8th Cir. 1996) 9, 20

United States v. Altman, 48 F.3d 96 (2nd Cir. 1995) 16

United States v. Baren, 305 F.2d 527 (2nd Cir. 1962) 8

United States v. Beitscher, 467 F.2d 269 (10th Cir. 1972) 8

United States v. Biesiadecki, 933 F.2d 539 (7th Cir. 1991) 8, 17

United States v. Brandon, 17 F.3d 409 (1st Cir.), *cert. denied*, 513 U.S. 820 (1994) 8

United States v. Brewer, 528 F.2d 492 (4th Cir. 1975) 27

United States v. Bush, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976) 8

United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) 27, 28

United States v. Christopher, 142 F.3d 46 (1st Cir.), *cert. denied*, 525 U.S. 1054 (1998) 11

United States v. Ciccone, 219 F.3d 1078 (9th Cir. 2000) 8

United States v. Coffman, 94 F.3d 330 (7th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997) 8, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Comyns, 248 U.S. 349 (1919) 14

United States v. Cosentio, 869 F.2d 301 (7th Cir. 1989), *cert. denied*, 492 U.S. 908 (1989) 11

United States v. Falcone, 934 F.2d 1528 (11th Cir.), *vacated*, 939 F.2d 1455, *reinstated*, 960 F.2d 988, *cert. denied*, 405 U.S. 902 (1992) 15

United States v. Frost, 125 F.3d 349 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998) 11

United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998) 8

United States v. Joselyn, 99 F.3d 1182 (1st Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997) 20

United States v. Lopez, 71 F.3d 954 (1st Cir. 1995), *cert. denied*, 518 U.S. 1051 (1916) 8

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995) 14

United States v. Massey, 48 F.3d 1560 (10th Cir.), *cert. denied*, 515 U.S. 1107 (1995) 15

United States v. Masten, 170 F.3d 790 (7th Cir. 1999) 8

United States v. Maze, 414 U.S. 395 (1974) 15

United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976) 27

United States v. Monjar, 47 F. Supp. 421 (D. Del. 1942), *aff'd*, 147 F.2d 916 (3rd Cir. 1944), *cert. denied*, 325 U.S. 859 (1945) 8

United States v. O'Hagan, 521 U.S. 642 (1997) 7

United States v. Richman, 944 F.2d 323 (7th Cir. 1991) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Trapilo, 130 F.3d 547 (2nd Cir. 1997), *cert. denied*, 525 U.S. 812 (1998) 16

United States v. Turkette, 452 U.S. 576 (1981) 29

United States v. Utz, 886 F.2d 1148 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990) 11

United States v. Walters, 997 F.2d 1219 (7th Cir. 1993) 11

Weiss v. United States, 122 F.2d 675 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941) 16

Wisland v. Admiral Beverose Corp., 119 F.3d 733 (8th Cir. 1997) 29

Young v. Ray Brant Dodge, Inc., 176 F.R.D. 230 (E.D. La. 1997) 5

STATUTES:

15 U.S.C. § 1601 et seq. 22

18 U.S.C. § 371 26

18 U.S.C. § 1341 ..... 2, 7, 26

18 U.S.C. § 1343 2

18 U.S.C. § 1344 7

18 U.S.C. § 1961 2

18 U.S.C. § 1961(1)(B) 7

18 U.S.C. § 1964(c) 1, 7, 29

18 U.S.C. § 1965 28

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1254 1

The Truth in Lending Act, Pub. L. 90-321, 82 Stat. 146 (1968) 22

Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, *amending* 18 U.S.C. § 1964(c) 29

La. R.S. 6:962 4

La. R.S. 6:969.4 4

La. R.S. 6:969.20 4

OTHER:

WILLIAM ANDERSON, A DICTIONARY OF LAW (1889) 14

JOEL BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW (1889) 13

MELVILLE BIGELOW, THE LAW OF FRAUD (1877) 14

CLARK & MARSHALL, LAW OF CRIMES (6th ed. Melvin F. Wingneesky ed. 1958) 14, 16

Courtney Chetty Genco, *Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. (1992) 14

VICTOR HUGO, LES MISERABLES (Heritage Press 1938) 19

CARL KAYSEN, et al., ANTITRUST POLICY (1959) 29

Paige Keeton, *The Ambit of Fraudulent Representation Representator's Liability*, 17 TEX. L. REV. 1 (1938) 24

TABLE OF AUTHORITIES – Continued

Page

WAYNE R. LAFAVE, CRIMINAL LAW (3rd ed. 2000)....17, 20

ROLLIN M. PERKINS, et al., CRIMINAL LAW (3rd ed. 1982)..... 14

WILLIAM PROSSER, et al., LAW OF TORTS (5th ed. 1984).....13, 24

MAX RADIN, THE LAWFUL PURSUIT OF GAIN (1931) 17

FREDERICK POLLOCK, A TREATICE ON THE LAW OF TORTS 348-88 (1894) 13

Jed Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771 (1980) 27

BRIEF FOR UNITED STATES, BROWN V. UNITED STATES, No. 93-4063 (11th Cir. 1995) 18

Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm., 100th Cong. 2nd Sess. (1988) 13

REST. OF TORTS (SECOND) § 774B (1979) 25

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 2, 2001.

OPINIONS BELOW

The decisions of the United States District Court for the Eastern District of Louisiana are unreported and reprinted in the Appendix to this Petition. (App. 16, App. 36, App. 46)

The decision of the United States Court of Appeals for the Fifth Circuit is unreported and reprinted in the Appendix to this Petition. (App. 2)

The Order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing is reprinted in the Appendix to this Petition. (App. 61)

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 2, 2001. (App. 2) Petitioners' timely petition for rehearing was denied on May 9, 2001. (App. 61)

STATUTORY PROVISIONS

18 U.S.C. § 1964(c), in relevant part, provides:

> Any person injured in his business or property by reason of a violation of [RICO] . . . may sue . . . in any appropriate United States district court. . . .

18 U.S.C. § 1961, in relevant part provides:

> (1) "racketeering activity" means . . . (B) any act . . . under . . . title 18, . . . United States Code . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

18 U.S.C. § 1341, in relevant part, provides:

> Whoever having devised . . . any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any post office . . . any matter . . . to be . . . delivered by Postal Service . . . shall be fined . . . or imprisoned. . . .

18 U.S.C. § 1343, in relevant part, provides:

> Whoever, having devised . . . any scheme to defraud . . . transmits by means of wire communication in interstate or foreign commerce, any . . . signals . . . for the purpose of executing such scheme . . . shall be fined . . . or imprisoned. . . .

STATEMENT OF THE CASE

This Petition presents two questions: (1) Is a RICO "scheme to defraud," where a consumer purchases credit life insurance, using standardized documents that unlawfully omit material information, tested by the standard "reasonably calculated to deceive persons of ordinary prudence and comprehension"? and (2) Is the "materiality" of and omission in standardized documents that omit material information sufficient to show "proximate cause" between the "violation" and the "injury," or must it necessarily be tested by "inducement and reliance"?

The Fifth Circuit limits "scheme to defraud" in the Federal mail and wire fraud statutes by requiring that

such schemes be "reasonably calculated to deceive persons of ordinary prudence and comprehension."[1] Left out are the gullible or dull who are most in need of the protection of the law. The Fifth Circuit's test is followed by a majority of the circuits. A minority extend the law to all who might be defrauded. The Fifth Circuit couples its limitation on "scheme to defraud" with a *universal* requirement of "inducement and reliance" between the perpetrator and the victim ("convergence") to establish "proximate cause" between a RICO "violation" and its "injury." The Fifth Circuit first applied its "proximate cause" limitation to a third party fraud, where the misrepresentation was made to one party, but the loss was suffered by another.[2] It has now extended it to a direct transaction where consumers purchased credit life insurance, using standardized documents that omitted material information. The Fifth Circuit's reliance requirement is followed in a minority of circuits. A more discriminating approach is followed by a majority of the circuits.

Petitioners are a putative class of Louisiana consumers who purchased vehicles by means of retail installment contracts, which provided for monthly installment payments.[3] At the same time, the Petitioners financed an insurance product called "credit life."[4] Petitioners were

---

[1] *Silverman v. United States*, 213 F.2d 405, 415 (5th Cir.), *cert. denied*, 348 U.S. 828 (1954).

[2] *Summit Properties, Inc. v. Hoechst-Celanese Corp.*, 214 F.3d 556, 562 (5th Cir.), *cert. denied*, 120 S.Ct. 896 (2001).

[3] Fourth Amended Complaint ("Complaint"), Par. 4, App. 70.

[4] Complaint, Par. 4, 8, App. 70-72. Credit life insurance is defined as "insurance on the life of a debtor for the security of his creditor pursuant to or in connection with a loan or other credit transaction." Consumer Credit Guide (CCH) ¶3224,

defrauded by the omission of material facts in the contracts, which unlawfully failed to disclose that the premium charged included coverage for unearned interest.[5] This clever fraud is simple, but not obvious; no insurer ever bears the risk of paying *unearned* interest. Under the contracts, the current interest is paid to-date in the borrowers' monthly installments, before any principal, and then, in the event that the insurer must perform (*i.e.*, the borrower dies), no more interest accrues because the insurance proceeds retire the loan.[6] Thus, "credit life" coverage for unearned interest insures a completely nonexistent risk. None of the contracts at issue provided by its terms that unearned interest was included in the "sum payable" under the contract.[7]

---

comment 4(d)-6 (1988); insurance is not credit life if the creditor or the credit account of the consumer is not the beneficiary.

[5] Complaint, Par. 8, App. 72. The contracts also improperly failed to disclose that the sellers of the vehicles received a major portion of the insurance payments, which were secretly returned to the sellers. Complaint, Par. 9, App. 72-73.

[6] Louisiana law requires that in the event of early termination, at least 90% of unearned interest must be refunded, except for a "prepayment charge" of not more than $25.00. La. R. S. 6:969.20 (formerly La. R. S. 6:958). The "total sum payable under such contract" includes at most 10% of the pre-computed (*i.e.*, unearned) interest or $25.00. This is the amount that is included in the "total sum payable," and it does not include interest that is not yet earned. It specifically *excludes* all except 10% or $25.00 of the unearned, pre-computed interest.

[7] Indeed, if any contract *were* to provide that unearned interest was collectible, that provision would be unenforceable under Louisiana law. La. R. S. 6:969.4 (formerly La. R. S. 6:962), which provides that no person may waive any rights under the Louisiana Motor Vehicle Sales Financing Act; La. R. S. 6:969.20

The District Court initially denied defendants' Rule 12(b)(6) motions to dismiss and motion for summary judgment.[8] Then, after the Fifth Circuit's *Summit* decision, and transfer to another district judge, the District Court dismissed plaintiffs' RICO claims with prejudice.[9] The District Court found that Petitioners did not meet the *Summit* standard for "proximate cause," even though the fraud consisted of material omissions in standardized documents used to extend credit to unsuspecting consumers, where only a person trained in the specialized language of credit transactions could determine that they were fraudulent because of what they did not say.

Petitioners appealed to the Fifth Circuit, arguing that when a RICO "scheme to defraud" is based on omissions, rather than misrepresentations, the *materiality* of the

---

prohibits any lender from collecting unearned interest. *See* n.6 *supra*.

[8] *Order and Reasons*, May 31, 2000, App. 45.

[9] *Order Dismissing Case*, September 11, 2000, App. 16. In its opinion, the District Court specifically referred to its prior decision in *Young* v. *Ray Brant Dodge, Inc.*, 176 F.R.D. 230, 232 (E.D.La. 1997), in which Petitioner's counsel was involved, and which refused to certify a similar class, relying, in particular, on *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 348, 355-56 (S.D.Ga. 1996), *aff'd*, 117 F.3d 1344 (11th Cir. 1997) (following a standard of (1) "ordinary prudence" for "scheme to defraud" and (2) imposing a requirement of "detrimental reliance" for "by reason of" both of which were mandated by *Pelletier v. Zweifel*, 921 F.2d 1465, 1498, 1506-09 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991)). *See* App. 46 at 53 (reprinting *Buford*). Petitioners' Complaint, which is premised on material omissions, rather than misrepresentations, was drafted in light of the District Court's opinion and its reliance on the *Pelletier* standard for a RICO "scheme to defraud" and "proximate cause." It sought to plead a class that could be certified despite the restrictive standards of *Pelletier*. *See* App at 27-28 nn.6&7.

omissions themselves, and not after the fact hypothetical reliance, establishes "proximate cause" between "violation" and "injury." The Fifth Circuit rejected Petitioners' argument, and affirmed the District Court's decision.[10] The Fifth Circuit, in short, applied a *universal* "inducement and reliance" limitation to all "scheme to defraud" civil RICO claims. Rehearing was denied by order entered May 9, 2001.

Petitioners seek this Court's review of the Fifth Circuit's RICO "scheme to defraud" decisions, as they apply to consumer fraud; they are in conflict with decisions of other circuits and states. Under the law of the Fifth Circuit, "scheme to defraud" protects only the wary; it ought, as elsewhere, to protect the unwary; and, under the law of the Fifth Circuit, "proximate cause" must be shown, even in a consumer fraud, which steals the consumer's money, and which is effected by clever omissions, by after the fact hypothetical reliance; it ought, as elsewhere, be sufficient to establish "proximate cause" to show the materiality of the omission, particularly where the theft is accomplished by fraudulent standardized consumer credit documents.

REASONS FOR GRANTING THE WRIT

I Conflicting With Various Courts of Appeal And State Decisions, The Fifth Circuit's Decision Requires Review To Settle Recurring Questions In Nation-Wide Litigation Under Important Federal Statutes.

Overview

RICO authorized persons "injured" in their business or property "by reason of" its "violation" to sue for

---

[10] Opinion of the Fifth Circuit Court of Appeals, April 2, 2001, App. 2.

appropriate redress. 18 U.S.C. § 1964(c). A "violation" of RICO may be committed if a person engages, using the mail or interstate wires, in "any scheme to defraud." 18 U.S.C. §§ 1341, 1344, 1961(1)(B), 1962. Under this Court's well-settled jurisprudence, "scheme to defraud" is broadly defined to extend "to a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 628 (1926). It "usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching." *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (citations omitted). Its fraudulent elements, when they involve representations or omissions, must be "material." *Neder v. United States*, 527 U.S. 1, 17-23 (1999). But "scheme to defraud" extends beyond frauds accomplished by misrepresentation or omissions, *Grin v. Shine*, 187 U.S. 181, 189 (1902) (embezzlement), and it extends beyond face-to-face transactions, *United States v. O'Hagan*, 521 U.S. 642, 649-58 (1997) (misappropriation and use of confidential information to trade on securities); *Carpenter*, 484 U.S. at 25-29 (insider trading).

A. The Fifth Circuit's "Ordinary Prudence" Standard For "Scheme to Defraud" Is Followed In Seven Circuits, But Is In Conflict With Three Circuits.

Under Fifth Circuit's jurisprudence, "scheme to defraud" is tested by an objective standard: it must be "reasonably calculated to deceive persons of ordinary prudence and comprehension?"[11] Its test is used in the Second, Third, Fourth, Sixth, Eighth, Tenth and Eleventh

---

[11] *Silverman*, 213 F.2d at 407.

Circuits.[12] Its test is not used in the First, Ninth, and District of Columbia Circuits; they uphold "schemes to defraud" aimed at the "gullible or skeptical, dull or bright."[13]

---

[12] *United States v. Baren*, 305 F.2d 527, 533 (2nd Cir. 1962); *Brokerage Concepts, Inc. v. U.S. Health Care Inc.*, 140 F.3d 494, 528 (3rd Cir. 1998); *Linden v. United States*, 254 F.2d 560, 566 (4th Cir. 1958); *Advocacy Organization for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 322 (6th Cir.), *cert. denied*, 528 U.S. 871 (1999); *United States v. Hawkey*, 148 F.3d 920, 924 (8th Cir. 1998); *United States v. Beitscher*, 467 F.2d 269, 273 (10th Cir. 1972); *Pelletier v. Zweifel*, 921 F.2d 1465, 1498-99 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). *But see United States v. Monjar*, 47 F.Supp. 421, 425 (D. Del. 1942), *aff'd*, 147 F.2d 916 (3rd Cir. 1944), *cert. denied*, 325 U.S. 859 (1945).

[13] *United States v. Lopez*, 71 F.3d 954, 962 (1st Cir. 1995), *cert. denied*, 518 U.S. 1057 (1916); *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000) (distinguishing prior cases); *Deaver v. United States*, 155 F.2d 740, 744-45 (D.C. Cir.), *cert. denied*, 329 U.S. 766 (1946). *But see United States v. Brandon*, 17 F.3d 409, 425 (1st Cir.), *cert. denied*, 513 U.S. 820 (1994).

The Seventh Circuit attempts to reconcile its conflicting decisions. *Compare Spiegel v. Continental Illinois Natl. Bk.*, 790 F.2d 638, 646 (7th Cir.) (ordinary prudence), *cert. denied*, 479 U.S. 987 (1986) and *United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975) (ordinary prudence), *cert. denied*, 424 U.S. 977 (1976) *with United States v. Masten*, 170 F.3d 790, 795 (7th Cir. 1999) (no difference that a more astute person would not be deceived); *United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991) (gullible as well as skeptical) *and United States v. Coffman*, 94 F.3d 330, 334 (7th Cir. 1996) (effort to reconcile) (Posner, C.J.), *cert. denied*, 520 U.S. 1165 (1997).

Even the Fifth Circuit, the author of the "ordinary prudence" standard in *Silverman*, hands down contradictory opinions. *See Blachly v. United States*, 380 F.2d 665, 671 & 672 n.13 (5th Cir. 1967) (citing both *Silverman* and *Deaver*, 155 F.2d at 745 ("monumental credulity of victim is no shield")).

B. The Fifth Circuit's Test For "Proximate Cause" Between A RICO "Scheme To Defraud" And Its Attendant "Injury" Is Followed In Two Circuits, But Is In Conflict With Seven Circuits.

The Fifth Circuit's *universal* test for "proximate cause" in a RICO "scheme to defraud," that is, inducement and reliance, is echoed in the Seventh Circuit,[14] consistent with Sixth Circuit precedent,[15] but is in conflict with decisions of the Second, Third, Fourth, Eighth, Ninth, Eleventh, and District of Columbia Circuits.[16] The Fifth Circuit's

---

[14] *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 606 (7th Cir. 2000).

[15] *Central Distributors of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994).

[16] *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 258-62 (2nd Cir. 1995) (RICO: neither reliance nor convergence; third party fraud), *cert. denied*, 516 U.S. 1114 (1966); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2nd Cir. 1999) (third party fraud); *accord Ifill v. West*, 1999 U.S. Dist. Lexis 21320 *30-35 (S.D. N.Y. 1999); *Cement Contractors Workers District Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2nd Cir. 1988) (third party fraud) (citing *Shaw v. Rolex Watch, U.S.A.*, 726 F. Supp. 969, 973 (S.D. N.Y. 1989)); *Standardbred Owners Ass'n v. Roosevelt Raceway Associates*, 985 F.2d 102, 104-05 (2nd Cir. 1993) (third party fraud); *Steamfitters Local Union v. Philip Morris, Inc.*, 171 F.3d 912, 921 (3rd Cir. 1999) (factor approach for proximate cause for RICO and antitrust) (Becker, C.J.), *cert. denied*, 528 U.S. 1105 (2000); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1055, 1067 (3rd Cir. 1988) (third party fraud and antitrust), *aff'd on other grounds*, 493 U.S. 400 (1990); *John C. Holland Enter., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F.Supp. 1242, 1249 (E.D. Va. 1987) (third party fraud), *aff'd without opinion*, 829 F.2d 1120 (4th Cir. 1987); *Mid Atlantic Telecon, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir.) (third party fraud), *cert. denied*, 513 U.S. 931 (1994); *Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 339 (4th Cir. 1996) (systemic reliance on legality of process); *United Health Care Corp. v. Am. Trade Ins. Co.*,

requirement of inducement by the perpetrator and detrimental reliance by the victim ("convergence") is

---

Ltd., 88 F.3d 563, 572 (8th Cir. 1996) (proximate cause without reliance for theft); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325-27 (8th Cir.) (third party fraud), *cert. denied*, 510 U.S. 823 (1993); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 96, 991-92 (8th Cir. 1989) (proximate cause without reliance for theft); *Oregon Laborers Employers Health & Welfare Trust Fund v. Research, Inc.*, 185 F.3d 957, 963-68 (9th Cir. 1999) (factor approach for proximate cause in RICO and antitrust), *cert. denied*, 528 U.S. 1075 (2000)); *All Care Nursing Service v. High Tech Staffing*, 135 F.3d 740, 745 n.10 (11th Cir. 1998) (proximate cause without reliance in fraudulent billing), *cert. denied*, 526 U.S. 1016 (1999); *Cox v. Administrator For United States Steel & Carnegie*, 17 F.3d 1386, 1399-1403 (11th Cir. 1994) (third party fraud), *modified on rehearing on other grounds*, 30 F.3d 1347, *cert. denied*, 513 U.S. 1110 (1995); *Taffet v. Southern Co.*, 930 F.2d 847, 857 (11th Cir. 1991) (third party fraud), *modified on other grounds*, 958 F.2d 1514, *cert. denied*, 506 U.S. 1021 (1992); *BCCI Holding (Luxembourg), S.A. v. Khalil*, 214 F.3d 168, 174 (D.C. Cir.) ("target" rejected), *cert. denied*, 513 U.S. 958 (2000). *But see Laborers Local No. 17 v. Philip Morris, Inc.*, 192 F.3d 223, 230-33 (2nd Cir. 1999) ("derivative" label for proximate cause), *opinion withdrawn and new opinion substituted*, 191 F.3d 229, 234 n.3 & 239 n.4 (factor approach for proximate cause), *cert. denied*, 120 S. Ct. 799 (2000); *Abrams v. Young & Republican, Inc.*, 79 F.2d 234, 237-39 (2nd Cir. 1996) ("zone of interest" for proximate cause), *cert. denied*, 519 U.S. 816 (1996); *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 446-47 (8th Cir. 2000) ("target" for proximate cause); *Appletree Square I, Ltd. v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994) (reliance required face-to-face); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.) (reliance required face-to-face), *cert. denied*, 502 U.S. 855 (1991); *Johnson Enterprises of Jacksonville, Inc. v. FPL Group Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (reliance required face-to-face).

followed by the Fourth, Seventh, and Ninth Circuits,[17] but is rejected by the First Circuit.[18]

As the majority of the circuits recognize, the Fifth Circuit's decision misconstrues *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Following antitrust precedent, *Holmes* read "by reason of" in RICO to embody traditional notions of "proximate cause." 503 U.S. at 265-69 (citing *Associated General Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters*, 495 U.S. 519, 535 (1983) (AGC)). *Holmes* applied modified antitrust "proximate cause" remoteness concepts to RICO; it did not deal with other aspects of proximate cause.[19] Because "scheme to defraud" is broader than face-to-face misrepresentation fraud, "inducement and reliance" cannot be a *universal*

---

[17] *Mylan Laboratories, Inc. v. Matikari*, 7 F.3d 1130, 1137 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994); *Lifschultz Fast Freight Inc. v. Consolidated Freightway Corp. of Delaware D.S.C.*, 805 F. Supp. 1277, 1291-92 (D.C.S.C. 1992), *aff'd without opinion*, 998 F.2d 1009 (4th Cir.), *cert. denied*, 510 U.S. 993 (1993); *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993); *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990). *But see In Re EDC, Inc.*, 930 F.2d 1275, 1279 (7th Cir. 1991); *United States v. Cosentio*, 869 F.2d 301, 307 (7th Cir.), *cert. denied*, 492 U.S. 908 (1989).

[18] *United States v. Christopher*, 142 F.3d 46, 52-53 (1st Cir.), *cert. denied*, 525 U.S. 1054 (1998). *See United States v. Frost*, 125 F.3d 349, 361 (6th Cir. 1997) (split noted), *cert. denied*, 525 U.S. 810 (1998).

[19] *See Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 148 n.5 & 149 (5th Cir. 1997) ("guided by indications of preconceived purpose, specifically intended consequences, necessary or natural result, reasonable foreseeability of result, the intervention of independent causes, whether the defendant's acts are a substantial factor . . . and . . . factual directness"), *vacated as moot*, 525 U.S. 979 (1998), *dismissed as moot*, 164 F.3d 900 (5th Cir. 1999).

requirement of "proximate cause." Where material omissions, rather than misrepresentations, are involved, particularly where standardized credit documents are used, the consumer is cheated out of his or her property in the transaction itself; "materiality" is, or ought to be, the only necessary nexus between "violation" and "injury." By requiring an after the fact inquiry into reliance, based on a hypothetical set of omitted facts, the Fifth Circuit's test blames the victim and condones the crime; and, it departs from decisions of the Second, Third, Seventh, Eighth, Ninth and Tenth Circuits and various states.[20]

---

[20] *Nat'l. Ass'n. of Pharmaceutical Mfg. v. Ayerst Labs*, 850 F.2d 904, 912-13 (2nd Cir. 1988) (antitrust); *In Re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1168-69 (3rd Cir. 1993) (antitrust); *Angelico v. Lehigh Valley Hospital, Inc.*, 184 F.3d 268, 274 (3rd Cir. 1999) (antitrust); *Dzadousky v. Lyons Ford Sales, Inc.*, 593 F.2d 538, 539 (3rd Cir. 1979) (Truth in Lending); *Blue Cross & Blue Shield, United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1414 (7th Cir. 1995) (antitrust), *cert. denied*, 525 U.S. 1071 (1999); *Gibson v. Bob Watson Chevrolet-GEO, Inc.*, 112 F.3d 283, 287 (7th Cir. 1997) (Truth in Lending); *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407, 415 (7th Cir. 1980) (Truth in Lending); *Int'l Travel Arrangers v. Western Airlines*, 623 F.2d 1255, 1268 (8th Cir.) (antitrust), *cert. denied*, 449 U.S. 1063 (1980); *Dixey v. The Idaho First Nat'l Bk.*, 766 F.2d 749, 751 (9th Cir. 1983) (Truth in Lending); *Herrera v. First Northern Savings & Loan Ass'n*, 805 F.2d 896, 899-900 (10th Cir. 1986) (Truth in Lending); *Baker Bk. & Trust Co. v. Matthews*, 401 So. 2d 1246, 1250 (1st Cir. La. 1981) (Truth in Lending); *Super Chief Credit Union v. Gilchrist*, 232 Kan. 40, 653 P.2d 117, 122 (1982) (Truth in Lending); *Merchandise Nat'l. Bk. of Chicago v. Scanlon*, 86 Ill. App. 3d 719, 722, 408 N.E. 2d 248, 251 (1980) (Truth in Lending); *Smith v. Greater Houston Bk.*, 580 S.W. 2d 165, 166 (Ct. of Civ. App. 1st Dist. TX 1979) (Truth in Lending). *See also Bizier v. Globe Fin. Serv., Inc.*, 654 F.2d 1, 4 (1st Cir. 1981) (dicta) (Truth in Lending). *But see Peters v. Lupient Oldsmobile Co.*, 220 F.3d 915, 916 (8th Cir. 2000) (Truth in Lending).

Analysis

A. The Fifth Circuit's "Ordinary Prudence" Standard Cannot Be Justified By Text, Authority, Or Rationale

The root of the Fifth Circuit's mistaken jurisprudence lies in its confusing various kinds of "fraud," a term as Prosser so ably teaches, that is "so vague that it requires definition in nearly every case." WILLIAM PROSSER, et al., LAW OF TORTS 727 (5th ed. 1984). The Fifth Circuit conflates "scheme to defraud" under Federal Law[21] with common law "obtaining money by false pretenses," a crime, and common law "deceit," a tort – each of which contain misrepresentation/omission and reliance elements – with common law "cheat," a crime that required an intent to defraud and a false symbol or token – but neither misrepresentation, omission, inducement, nor reliance – and "conspiracy to defraud," a crime. Early decisions and treatises refer to the common law action for misrepresentation, not as "fraud," but as "deceit."[22] When

---

Other circuits, in fact, contain conflicting decisions. *Compare Stout v. V.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000) (Truth in Lending), *cert. denied*, 121 S. Ct. 1088 (2001) *with Rudisell v. The Fifth Third Bank*, 622 F.2d 243, 250-52 (6th Cir. 1980) (Truth in Lending); *compare Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1360 (11th Cir. 2000) (Truth in Lending) *and Steele v. Ford Motor Credit Co.* 783 F.2d 1016, 1018 (11th Cir. 1986) (Truth in Lending) *with Turner v. Beneficial Corp.*, 242 F.3d 1023, 1024 (11th Cir. 2001) (Truth in Lending) (en banc) (*overruling Ranson v. S & S Food Center, Inc. of Fla.*, 700 F.2d 670, 675 (11th Cir. 1983)).

[21] The phrase appears in up to 500 Federal statutes as well as 50 sections of Title 18. *Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 100th Cong. 2nd Sess. 17 (1988) (Testimony of Acting Assistant Attorney General John C. Keeney).

[22] *See, e.g.*, JOEL BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 132-44 (1889); FREDERICK POLLOCK, A TREATICE ON THE LAW OF TORTS 348-88 (1894).

"fraud" alone is used, it signifies a much broader range of overreaching conduct.[23] In fact, "scheme to defraud" in Federal law stems from a careful statutory blend of common law "cheat" and "conspiracy to defraud."[24] As common law "false pretenses" or "deceit" did not, "scheme to defraud" includes making promises with an intent not to perform, *United States v. Comyns*, 248 U.S. 349, 353 (1919), and embezzlement, *Grim v. Shine*, 187 U.S. 181, 189 (1902).[25] Cheating – without misrepresentation or omission – suffices to establish a "scheme to defraud."[26] In short, "[c]ourts . . . read . . . mail

---

[23] *See, e.g.*, MELVILLE BIGELOW, THE LAW OF FRAUD 3-4 (1877); WILLIAM ANDERSON, A DICTIONARY OF LAW 474-78 (1889).

[24] See Courtney Chetty Genco, *Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 337-64 (1992):

> [M]ail fraud is the culmination of a long historical progression. Seen in the light of . . . history, the congressional drafters purposely took elements from older offenses, while purposely leaving other elements out. The victim of larceny, embezzlement, or false pretense had to suffer a property loss. Mail fraud does not require such loss. Common-law cheat required a token. . . . [M]ail fraud does not require such a token. . . . The requirements of common law cheat could be met [without a token] by a conspiracy to defraud. The congressional drafters of mail fraud deliberately substituted the concept of 'scheme.' The drafters also retained the element of 'intent to defraud' required by false pretenses. . . . Accordingly, mail fraud is best seen as a modern form of common-law cheat.

[25] *See generally* ROLLIN M. PERKINS, et al., Criminal Law 292-342, 351-388 (3rd ed. 1982); CLARK & MARSHALL, LAW OF CRIMES 706-780, 795-840 (6th ed. Melvin F. Wingersky ed. 1958) (*Clark & Marshall*).

[26] *See, e.g., United States v. Manzer*, 69 F.3d 222, 226-27 (8th Cir. 1995) (selling unauthorized satellite unscrambler); *Atlas Pile*

fraud and wire fraud to forbid [. . .] both schemes to defraud that do not involve false pretenses or representations, and schemes to defraud by means of such false pretenses or representations."[27] Accordingly, the elements of "scheme to defraud" may be simply set out. The defendant must act with "intent to defraud." *Durland v. United States*, 161 U.S. 306, 312-14 (1896). He or she must formulate his or her "scheme."[28] "Scheme" is "sufficiently general" to reach a broad range of illicit activity. *United States v. Maze*, 414 U.S. 395, 399 n.4 (1974) (applies to credit cards, not in existence in 1872, when mail fraud was drafted). The defendant must intend to deprive another of something of value, or to gain a benefit for himself or herself by means of deprivation or gain. *Carpenter*, 484 U.S. at 27.[29] "Intent . . . make[s] an otherwise innocent act criminal, if it is a step in a plot." *Badders v. United States*, 240 U.S. 391, 394 (1916) (mail fraud) (Holmes, J.). Apart from the jurisdictional elements (mail, wire, etc.), "scheme to defraud," *requires* nothing else; it may

---

Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989) (RICO; manipulating contract payments).

[27] *United States v. Falcone*, 934 F.2d 1528, 1539 n.28 (11th Cir.), *vacated on other grounds*, 939 F.2d 1455 (1991), *reinstated in relevant part*, 960 F.2d 988 (1992) (en banc), *cert. denied*, 506 U.S. 902 (1992); *accord Murr Plumbing v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995) (RICO); *Formax, Inc. v. Hostert*, 841 F.2d 388, 390 (Fed. Cir. 1988) (RICO).

[28] *United States v. Massey*, 48 F.3d 1560, 1566 (10th Cir.) ("A scheme refers to the overall design to defraud one or many by means of a common plan or technique."), *cert. denied*, 515 U.S. 1107 (1995).

[29] The "contemplated" loss need not even be easily measurable. *See, e.g., United States v. Richman*, 944 F.2d 323, 329-31 (7th Cir. 1991) (loss of an opportunity to bargain because a lawyer plotted to pay an insurance agent to settle a claim).

be implemented through a variety of techniques, including, *but not limited to,* representations, etc.[30] A comprehensive definition of "scheme to defraud" "need not be undertaken," *Fasulo,* 272 U.S. at 628, and it has not been.[31]

Confusing "scheme to defraud" with "false pretenses," the Fifth Circuit initiated the "ordinary prudence" test in *Silverman v. United States,* 213 F.2d 405, 410 (5th Cir.), *cert. denied,* 348 U.S. 828 (1954). To be sure, early authority, under "false pretenses," may be found that support the Circuit's rule,[32] but its view, even then, was not sound:

> By the overwhelming weight of authority, the test is whether the pretense was calculated to deceive the particular person to whom it was made and not whether it was calculated to deceive persons of ordinary intelligence, prudence and caution.[33]

---

[30] *United States v. Trapilo,* 130 F.3d 547, 551 (2nd Cir. 1997) (scheme to defraud Canadian Government out of cigarette tax revenue) ("Under both the mail and wire fraud statutes, '[t]he thing which is condemned is (1) the forming of the scheme to defraud, *however and in whatever form it may take,* and (2) a use of [mail and wire communications] in furtherance. *If that is satisfied, more is not required.*") (citations omitted; emphasis added), *cert. denied,* 525 U.S. 812 (1998).

[31] *United States v. Altman,* 48 F.3d 96, 102 (2nd Cir. 1995) ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human integrity.") (quoting *Weiss v. United States,* 122 F.2d 675, 681 (5th Cir.) (contract price raised by fictitious extra charges), *cert. denied,* 314 U.S. 687 (1941).

[32] *See Clark & Marshall,* 830 n.14 (collecting early citations).

[33] *Id.* (collecting early citations). *See, e.g., Bartlett v. State,* 28 Ohio St. 669, 670 (1876) ("Even persons deprived of ordinary

The rationale of the majority rule, though a minority rule under the Federal fraud statutes, can be stated in a sentence; the "criminal law aims to protect those who cannot protect themselves."[34]

The Fifth Circuit's test cannot be squared with the statute or modern conceptions of "fraud." The statute says "any" fraud. 18 U.S.C. § 1341. "Any" means "all" not "some, but not others," *Mobil Oil Exploration v. United States Distribution Co.*, 498 U.S. 211, 223 (1991), and no convincing policy justification can be – or has been – offered to support it in our modern society. The philosophy of caveat emptor is discredited.[35] The test indefensibly distracts fact-finders from an evaluation of the culpability of the defendant by blaming the victim.[36] As

---

discretion, children, or idiots, are entitled to the protection of the laws, and a man who is ineffectibly dull may not for that reason alone be robbed with impunity.")

[34] WAYNE R. LAFAVE, CRIMINAL LAW 842 & n.94 (3rd ed. 2000) (*Lafave*) (collecting decisions and reporting an "almost-universal modern" rule that does not limit the scope of the law's protection).

[35] *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963); MAX RADIN, THE LAWFUL PURSUIT OF GAIN 54 (1931) ("[C]aveat Emptor . . . is bad Latin, and from the Roman point of view, worse law.")

[36] *Biesiadecki*, 933 F.2d at 544 (ordinary prudence standard improperly shifts focus from perpetrator's intent to victim's beliefs). *See, e.g., Brown v. United States*, 79 F.3d 1550, 1559 (11th Cir. 1996) (Florida land fraud conviction reversed; persons of ordinary prudence would not rely on seller's affirmative representation of value under doctrine of caveat emptor) (citing *Simms v. Biondo*, 816 F. Supp. 814, 820-22 (E.D. N.Y. 1993) ("caveat emptor applies to real estate")). Many of the victims to whom the *Brown* defendants sold houses were "first-generation Americans . . . referred to as 'ethnics' by the sales force." BRIEF

Chief Judge Posner remarks: "It would be very odd for the law to protect only those who, being able to protect themselves, do not need the law's protection."[37] The Fifth Circuit's rule is, in short, without a basis to support it.

B. The Materiality Of An Omission, Where A Consumer Purchases A Product, Using Standardized Credit Documents That Unlawfully Omit Material Information, Is A Sufficient Nexus Between "Violation" and "Injury" In A RICO "Scheme To Defraud."

Fundamentally, the Fifth Circuit's rule misunderstands this Court's decision in *Holmes*, which teaches that factual ("but for") cause by itself is insufficient. 503 U.S. at 265. Other policy consideration must, in each instance, be examined to determine the proper extent of liability, *id.* at 266, but no "black letter rule . . . will dictate the result in every case." *Id.* at 274 n.20 (citing *AGC*, 459 U.S. at 536). Contrary to the Fifth Circuit,[38] *Holmes* dealt only with "remoteness;" it said nothing about the other policy considerations embraced in "proximate cause." If "scheme to defraud" is *not* limited to simple, face-to-face, misrepresentation fraud – as it is not, but as the Fifth Circuit's blanket rule presupposes – then *universally* requiring "inducement" and "reliance" to establish the proper nexus between "violation" and "injury" under RICO is simply unintelligible. In a particular instance, they may be *sufficient*, but they are not *necessary*, in all instances, as the decisions of other circuits and the states

---

FOR UNITED STATES, BROWN V. UNITED STATES No. 93-4063 at 3, 97 (11th Cir. 1995).

[37] *Coffman*, 94 F.3d at 334.

[38] *Summit*, 214 F.3d at 558-59.

so aptly show. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988) ("There is . . . more than one way to demonstrate . . . [a] causal connection.") In brief, civil RICO added "proximate cause" to "scheme to defraud," but "proximate cause" may be shown in a variety of ways.[39]

This Petition involves, moreover, not a misrepresentation, but a material omission. When the vehicle dealers unlawfully omitted material information about credit life insurance, and wrongfully took the consumers property, they committed, *at that point*, criminal theft; it was an illicit overcharge.[40] When the French three gendarmes brought Jean Valjean back for stealing a silver plate, the saintly Bishop did not say, "If you had asked, I would have given it to you." In fact, he had "to lie" and say, "I *gave* you [the plate and] the candlesticks. . . . Why did you not take them away with the . . . plate?" VICTOR HUGO, LES MISERABLES 102 (Heritage Press 1938) (emphasis added). The Bishop's "lie" did not – morally or legally – *exculpate* Jean Valjean from responsibility for the theft; the Bishop's act was an act of love, not an act of justice. Inquiry after the fact about "what if," where the consumer's property is stolen, is, or ought to be, irrelevant in

---

[39] On the other hand, the "common law requirement of 'justifiable reliance' and 'damage' plainly have no place in [establishing 'violation'] in the Federal fraud statutes." *Neder*, 527 U.S. at 23.

[40] *See, e.g., Roper v. Consurve*, 578 F.2d 1106, 1109, 1112 (5th Cir.) (unauthorized bank card fee; proximate cause easily established for class) ("[This is a] classic case for . . . class action. The claims of a large number of individuals can be adjudicated at one time. . . . While it may be necessary to make individual fact determination, . . . these will depend on objective criteria. . . . "), *affirmed on other grounds*, 445 U.S. 326 (1979).

a modern society.[41] Indeed, requiring it, comes perilously close to the condonation of crime.[42] Unlike the Fifth Circuit's blanket rule, the proper approach – generally recognized by circuit courts and state courts of appeal – to material omissions is well-demonstrated by this Court's decision in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152 (1972): "[P]ositive proof of reliance is not a prerequisite to recovery." "All that is necessary is that the omission be 'material.'" *Id.* The "obligation to disclose . . . with [the] withholding of a material fact establish[es] the requisite element of causation in fact." *Id.* Damage may, therefore, be assessed. *Id.* (difference in fair value of what was received and would have been received without fraud or defendant's profit). *Accord Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970) (material omission in proxy solicitation gives rise to liability; proper relief, including damages, a question of circumstances). The requirement of "materiality" is assessed objectively, *at the time of the event, not hypothetically and subjectively after the fact*; no proof is necessary to show that "the defect actually had a decisive effect" on the transaction. *Id.* at 382 ("[W]here . . . a finding of materiality . . . [is made,] a sufficient showing of causal relationship between the violation and the

---

[41] *Accord United Health Care Corp.*, 88 F.3d at 572 (theft); *Atlas Pile Driving Co.*, 886 F.2d at 991-92 (theft); *All Care Nursing Service*, 135 F.3d at 745 n.10 (theft).

[42] *United States v. Joselyn*, 99 F.3d 1182, 1194 (1st Cir. 1996) (condonation of fraud not a defense), *cert. denied*, 519 U.S. 1116 (1997); *LaFave* at 516 (Absent special statute, "the victim's subsequent condonation . . . of the crime . . . is not a defense. . . . "). *See, e.g., State v. Craig*, 124 Kan. 340, 342, 259 P. 802, 803 (1972) (mother's consent after burning of barn not defense to son's arson).

injury" is established.). "This objective test . . . avoid[s] the impracticalities of determining actual effect" and vindicates "congressional policy." *Id.* at 385. *See also id.* at 382 n.5 ("reliance on the nondisclosure of a fact is a particularly difficult matter to define or prove").

Contrary to the inflexible approach of the Fifth Circuit, other circuit decisions and state decisions recognize and apply these flexible principles. "Schemes to defraud" may involve simple, face-to-face misrepresentation fraud. Nevertheless, even in this apparently simple circumstance, "proximate cause" may require an analysis of, not only *transaction* (How did you get into the relationship?), but also of *loss* causation (Why did you suffer the loss?).[43] Proof of inducement and reliance, or its absence, may establish, or not establish, transaction causation.[44] (Loss causation is another matter; it also has to be independently established.) "Scheme to defraud" may also involve third party fraud, where a misrepresentation is

---

[43] *See, e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir.) (RICO; while transaction and loss causation may merge, each must be shown; fraud that induces entry into oil and gas partnership establishes transaction causation, but where the fraud is unrelated to the decline in market value, loss causation is not established) ("If the plaintiffs would have lost their shirts in the oil and gas business regardless of the defendants' violations of RICO, they have incurred no loss for which RICO provides a remedy."), *cert. denied*, 496 U.S. 906 (1990).

[44] *See, e.g., Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2nd Cir. 1992) (RICO; reliance in face-to-face misrepresentation fraud shows proximate cause between fraud and injury), *cert. denied*, 508 U.S. 952 (1993); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3rd Cir. 1996) (RICO; where plaintiff knew of overcharges, no proximate cause between face-to-face misrepresentation fraud and injury).

made to one entity, say, a rate setting commission – that may or may not itself suffer a property loss – where a loss is suffered by a third person, say, a rate-payer, and a gain inures to the perpetrator, say, a utility – a result that is intended, or at least foreseen; the loss and the gain need *not* be identical; they need only be related. Here, a *universal* requirement of reliance by the victim on a misrepresentation by the perpetrator would preclude recovery, and it is not required.[45] Instead, "proximate cause" must be shown under this Court's general remoteness standards.[46] "Scheme to defraud" may also involve omissions. Here, a *universal* requirement of reliance by the victim would preclude recovery, and it is not, by the better view, required.[47] Instead, "proximate cause" must

---

[45] *See, e.g., Taffet*, 930 F.2d at 857 (fraud on rate setting commission cognizable by rate payers); *County of Suffolk*, 907 F.2d at 1311-12 (absence in record of proof that rate-setting body relied on misrepresentation of utilities precluded rate-payers showing proximate cause between fraud and higher utility bills). *Taffet* and *County* are particularly significant; they were cited by *Holmes* to illustrate third party fraud, which might establish proximate cause for a victim. 503 U.S. at 279 n.19. *See, e.g., John C. Holland Enter., Inc.*, 653 F. Supp. at 1249, *aff'd*, 829 F.2d 1120; *In Re EDC. Inc.*, 930 F.2d at 1279.

[46] *See Holmes*, 503 U.S. at 272 n.19.

[47] The Truth in Lending Act, Pub. L. 90-321, 82 Stat. 146 (1968) (15 U.S.C. § 1601 *et seq.*), *as amended*, imposes certain disclosure duties on lenders. Where omissions are material, redress may be obtained, including rescission and statutory and actual damages. *See* 15 U.S.C. §§ 1635 (rescission), 1640 (statutory and actual damages). The statute is liberally construed. *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896, 898 (3rd Cir. 1989) (remedial statute). The statute is enforced by administrative proceeding and "private attorneys general" actions. *Bizer v. Globe Fin. Services, Inc.*, 654 F.2d 1, 2 (1st Cir. 1981). The "materiality" of an omission is tested by an

be shown, and it is by the use of the concept of "materiality," which reflects this Court's general "proximate

---

"objective" standard. *Steele v. Ford Motor Credit Co.*, 783 F.2d 1016, 1019 (11th Cir. 1986) (citing *Bustamante v. First Federal Savings & Loan*, 619 F.2d 360, 363 (5th Cir. 1980) ("objective" test precludes examination of conduct of consumer)); *accord Herrera v. First Northern Saving & Loan Ass'n.*, 805 F.2d 896, 899 (10th Cir. 1986); *Gambardella v. G. Fox & Co.*, 716 F.2d 104, 108 (2nd Cir. 1983); *Brown v. Marquette Savings & Loan Ass'n*, 686 F.2d 608, 614 (7th Cir. 1982); *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538, 539 (3rd Cir. 1979); *Baker Bk. & Trust Co. v. Matthews*, 401 So. 2d 1246, 1250 (CA 1st LA 1981); *Ed Marling Stores v. Miracle*, 612 Mo. App. 2d 175, 183, 627 P.2d 352, 360 (1981); *Merchandise Nat'l. Bk. of Chicago v. Scanlon*, 86 Ill. App. 3d 719, 722, 408 N.E. 2d 248, 253 (1980); *Smith v. Greater Houston Bk.*, 580 S.W. 2d 165, 167 (Ct. of Civ. App. 1st Dis. TX 1979). The statutory damage provision is sometimes referred to as a "civil penalty." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 376 (1973). It is more accurate to refer to it as "liquidated" damages. *Smith v. No. 2 Galesburgh Crown Fin. Corp.*, 615 F.2d 407, 415 (7th Cir. 1980) (claim for relief survives); *accord Citizen State Bk. of Marshfield, Mo. v. F.D.I.C.*, 751 F.2d 209, 218 (8th Cir. 1984) ("liquidated damages"). Uniformly, the decisions recognize that the recovery of "rescission" or "statutory" damages is not contingent on a showing by the consumer of inducement or reliance. Unfortunately, a series of recent decisions is imposing such a requirement for the recovery of "actual" damages. The decisions do not include a persuasive rationale for drawing the distinction. *See Peters v. Lupient Oldsmobile Co.*, 220 F.3d 915, 917 (8th Cir. 2000) (Heany, J., in dissent) ("A deceptive business practice, in and of itself, inflicts damage on the consumer. . . . [D]amages . . . claims may be measured by the amount of the violator's misrepresentation.") They are, therefore, wrongly decided. *See generally Turner v. Beneficial Corp.*, 242 F.3d 1023, 1025 (11th Cir. 2001) (en banc) (overruling *Ranson v. S & S Food Center, Inc. of Fla.*, 700 F.2d 670, 677 (11th Cir. 1983)) (collecting decisions).

cause" standards.[48] Finally, "scheme to defraud" may involve no material misrepresentation or omission. Here, a *universal* reliance requirement would preclude recovery, and it is not required.[49] Instead, "proximate cause" must be shown, and it is by the use of this Court's general "proximate cause" standards.[50]

The Fifth Circuit's requirement of "convergence" – representation from the perpetrator to the victim and loss from the victim – is a misguided importation of a discredited 19th century limitation on civil "deceit" into "scheme to defraud," a standard used in a *criminal* statute; it is taken from *Peek v. Gurney*, L.R., 6 Eng. & In. App. 377 (1873), where Lord Cairns held that a speaker who makes a misrepresentation is civilly liable only to whom he "desired" to influence by the representation in the fashion that occasioned the injury.[51] It, too, is not supported by the language of the statute, nor by any justifiable ground of public policy in a modern society. Limitations – misguided or not – on civil "deceit" "plainly have no place" in establishing a criminal "violation." *Neder*, 527 U.S. at 23. Nor should they – for that

---

[48] *See supra* text following n.42 (discussion of *Affiliated Ute Citizens of Utah* and *Mills*).

[49] Typically, the decisions involve some form of corruption, usually by bribes, either public or private. *See Environmental Tectonics*, 847 F.2d at 1067 (RICO; bribery of foreign government by bidder); *Bieter Co.*, 987 F.2d at 1326-28 (RICO; bribery of zoning board by opponents of applicant); *Cox*, 17 F.2d at 1399 (bribery of labor leaders in collective bargaining).

[50] *Id.*

[51] *Peek* is analyzed and criticized on its own terms in Paige Keeton, *The Ambit of Fraudulent Representation Representator's Liability*, 17 Tex. L. Rev. 1 (1938) and *Prosser* at 743-45 (5th ed. 1984).

matter – affect civil liability. *American Society of Mechanical Engineers v. Hydro Level Corp.*, 456 U.S. 556, 568-69 (1983) ("Victorian" common law limitations inappropriate on private enforcement of antitrust statutes.)[52]

These principles are well-understood and properly applied by a majority of the circuits, not only under RICO, but also, for example, under antitrust and Truth in Lending.[53] The circuits generally use this Court's factor standards – not labels – to determine the remoteness element of "proximate cause" under RICO.[54] RICO and antitrust overlap.[55] "Proximate cause" – with special antitrust modifications – is the same under RICO and antitrust.[56] Reliance and inducement are not *universal* requirements of antitrust proximate cause.[57] Similarly,

---

[52] In fact, results in common law decisions were not uniformly consistent with *Peek*. *See, e.g., Bohannon v. Wachovia Bk. & Trust Co.*, 210 N.C. 679, 683, 188 S.E. 390, 394 (1936) (testator deceived into disinheriting plaintiff; plaintiff has claim for relief against perpetrator); *accord* REST. OF TORTS (Second) § 774B (1979); *Mitchell v. Langley*, 143 Ga. 827, 831, 85 S.E. 1050, 1051 (1915) (holder of life insurance policy defrauded into switching beneficiary; beneficiary has claim for relief against perpetrator).

[53] *See supra* nn.16 & 47 (collecting circuit and state decisions).

[54] *See supra* n.16 (collecting decisions).

[55] *See, e.g., Environmental Tectonics*, 847 F.2d at 1067 (antitrust and RICO recovery upheld in bribery by bidder of foreign government).

[56] *Holmes*, 503 U.S. at 269-70.

[57] *See supra* n.16 (collecting decisions). *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988) (manufacture of plastic conduit could sue manufacture of steel conduit that improperly influence a trade association, which, in turn, promulgated a safety code that contained false product

under Truth in Lending, a modern effort to regulate consumer credit transactions, appropriate redress may be obtained where a material omission is made under an objective test without any showing of inducement and reliance.[58] These results under RICO, antitrust, and Truth in Lending cast into sharp relief the error of the Fifth Circuit. Review by this Court is required to make these legal paths run straight and parallel. In short, in the consumer fraud exemplified by this Petition, "loss" and "transaction" cause merger.[59] To require more, as does the Firth Circuit, but not its sister circuits, defeats congressional purpose.

II. Mail Fraud And RICO Are Important Federal Statutes Whose Fairness And Effectiveness Are Undercut By Conflicting Decisions Of The Circuit Courts Of Appeal.

Mail Fraud

First enacted in 1872, the mail fraud statute is the progenitor of the Federal fraud statutes codified in Title 18.[60] "[These statutes] have been regularly enforced by executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric." *Donaldson v. Read Magazine, Inc.*, 333 U.S.

---

safety information about plastic conduit, which, in turn, influenced market participants either not to use plastic conduit or to disapprove its use by others).

[58] *See supra* 47 (collecting decisions).

[59] *See Bastian*, 892 F.2d at 685.

[60] In fact, 18 U.S.C. § 371, first enacted in 1867, used "scheme to defraud." "There is no basis [, however,] for concluding that the term 'defraud' means something different in § 1341 . . . that what it means in § 371. . . . " *McNally v. United States*, 483 U.S. 350, 369 (1987) (Steven, J., in dissent).

178, 190 (1948) "During the past century, both Congress and [this] . . . Court have repeatedly placed their stamp of approval on expansive use of the mail fraud statute."[61] These fraud statutes serve as a " 'stop-gap' device which permits the prosecution of newly-conceived fraud until such time that Congress enact[s] particularized legislation to cope with the new frauds."[62]

RICO

In 1970, Congress enacted the RICO to deal with "enterprise criminality."[63] Like the antitrust statutes, Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) (antitrust). Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc. v. Northwestern Bell Telephone Co., Inc.*, 492 U.S. 229, 248-49 (1988).

---

[61] Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771, 772 (1980).

[62] *United States v. McNeive*, 536 F.2d 1245, 1248 n.5 (8th Cir. 1976) (citing *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., in dissent)). Nevertheless, the mail fraud statute remains a cumulative remedy. *See, e.g., United States v. Brewer*, 528 F.2d 492, 494 (4th Cir. 1975) (parallel application of mail fraud and Jenkins Act).

[63] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (citations omitted), *cert. denied*, 465 U.S. 1005 (1984).

"The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute." *Id.* at 248. Like the antitrust and Truth in Lending statutes, RICO creates "a private enforcement mechanism that . . . deter[s] violators[;] deprives them of the fruits of their illegal actions and . . . provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of VA v. McCready*, 457 U.S. 465, 472 (1982) (antitrust) (citing *Pfizer, Inc. v. India*, 434 U.S. 308, 313-14 (1978)); *Rotella v. Wood*, 528 U.S. 549, 558 (2000) (" 'private attorneys general' dedicated to eliminating racketeering activity.' * * * The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering. . . . ")[64] Like the antitrust and the Truth in Lending statutes, "RICO is to be read broadly." *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1984); *American Society of Mechanical Engineers, Inc.*, 456 U.S. at 568-69 (antitrust).[65] Indeed, RICO makes its principle of its liberal construction a matter of *express* statutory language. 84 Stat. 947 (1970).

The significance of this Petition to the fair and effective administration of the Federal fraud statutes and RICO can hardly be overstated. A substantial portion of civil RICO litigation enforces Federal "scheme to defraud" standards. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 149 (1987). Because of RICO's "pattern" element, an enforcement action can often be brought in more than one circuit. 18 U.S.C. § 1965 (nationwide venue and service of process provisions). Knowledgeable litigants can choose the "best"

---

[64] *Smith*, 898 F.2d at 898 (Truth in Lending).

[65] *Bizer*, 654 F.2d at 2 (Truth in Lending).

circuit in which to bring a RICO case based, not on the merits of their case, but on conflicts in circuit court law, not an edifying picture in a *national* system of law. Motions to transfer will have as their real reason, not "the correct" or "a more convenient" forum, but to obtain a more favorable circuit law.[66]

Conflicts on these key, and closely interrelated, elements of the civil enforcement of "scheme to defraud" under RICO – the proper standard for a "violation" and "by reason of" or "proximate cause" – are simply intolerable. To permit these issues to fester any longer is not fair to litigants, and it undermines RICO's effectiveness, criminally and civilly, as one of the guarantees of integrity of this country's national marketplace.[67]

If RICO is to be limited, as attempted by the Fifth Circuit in its seminal *Summitt* decision, and now in its unwarranted extension to material omissions in this litigation, that reform ought to come from Congress. *H.J. Inc.*, 492 U.S. at 249. Congress still sits; it can amend RICO – and it has. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, *amending* 18 U.S.C. § 1964(c) (conduct actionable as securities fraud may not be grounds for recovery under RICO). But Congress has *not* enacted *general* limitations on RICO's civil

---

[66] *Tel-Phonics Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) (RICO; law of transferee circuit applied). *See generally Wisland v. Admiral Beverose Corp.*, 119 F.3d 733, 735-36 (8th Cir. 1997).

[67] "There are three possible finds of force which a firm can resort to: violence (or threat of it), deception, or market power" CARL KAYSEN, et al., ANTITRUST POLICY 17 (1959). Antitrust focuses on the third; "scheme to defraud" focus on the second; RICO focuses on the first and second.

enforcement provisions against "schemes to defraud." That ought to end the matter judicially, absent constitutional considerations, which are not implicated here. *United States v. Turkette*, 452 U.S. 576, 587 (1981). ("There is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of . . . [RICO]"). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Tech v. Hughes*, 229 N.Y. 222, 228-29, 128 N. E. 185, 186 (1920), *cert. denied*, 254 U.S. 643 (1920).

CONCLUSION

For these reasons, Petitioners respectfully urge this Court to grant their Petition for a Writ of Certiorari and to resolve these conflicts between the circuits on RICO's interpretation where a "scheme to defraud" is alleged.

Respectfully submitted,

Of Counsel
DAWN ADAMS WHEELAHAN
650 Poydras St., Suite 1550
New Orleans, LA 70130
(504) 522-0495 (Telephone)
(504) 581-1624 (Facsimile)

TERRY RICHARDSON, JR.
DONNI E. YOUNG
NESS, MOTLEY, LOADHOALT,
RICHARDSON & POOLE
1555 Poydras St., Suite 1700
New Orleans, LA 70112
(504) 636-3480 (Telephone)
(504) 636-3499 (Facsimile)

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556-0780
(219) 631-5717 (Telephone)
(219) 631-4197 (Facsimile)
Blakey.1@nd.edu (E-mail)
Attorney for Petitioners

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-31154
(Summary Calendar)

MARION DIXON, ET AL,

Plaintiffs,

MICHELLE JAMES ORSO;
LEROY PERRY;
KEVIN DUTHU,

Plaintiffs-Appellants,

versus

FORD MOTOR CREDIT COMPANY;
CHRYSLER FINANCIAL CORPORATION;
NISSAN MOTOR ACCEPTANCE
CORPORATION; LOUISIANA DEALER
SERVICES INSURANCE, INC.; FIRST
ASSURANCE LIFE OF AMERICA;
AMERICAN NATIONAL INSURANCE
COMPANY,

Defendants-Appellees.

KEVIN WELLS, JR.; Etc; ET AL,

Plaintiffs,

versus

LOUISIANA DEALER SERVICES INC.;
FIRST ASSURANCE LIFE OF AMERICA;
CRESCENT CITY NISSAN EAST,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(Nos. 98-CV-2456-J; 99-CV-1819-J)

(Filed April 2, 2001)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants (collectively "Dixon"), who purchased credit life insurance from Defendants-Appellees lenders and credit insurers (collectively "Ford") in connection with automobile financing, appeal the district court's grant of summary judgment to Ford on their federal RICO claims and dismissal without prejudice of their pendent state-law claims. We affirm.

I.

FACTS AND PROCEEDINGS

In this consolidated action, Dixon brings claims against Ford under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[1] and the Louisiana Motor vehicle Sales Finance Act ("LMVSFA"),[2] seeking, *inter alia*, treble damages, costs, and attorneys' fees under the

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] 18 U.S.C. § 1961 *et seq.*

[2] La. Rev. Stat. 6:951 *et seq.*

civil liability provisions of RICO.[3] The gravamen of Dixon's complaint is that Ford allegedly engaged in a mail-fraud scheme involving the sale and financing of credit life insurance,[4] in connection with vehicle financing contracts, without disclosing to the purchasers that (1) the credit life insurance premium includes an additional amount of coverage for unearned interest on the contracts, which interest is never owed, resulting in the insurance of a non-existent risk; and (2) approximately 60 to 70 percent of the credit life insurance premium is "pocketed" by the vehicle dealer. Ford denies all liability.

To say that this case has had "a long and tortured history," as the district court put it, would be an understatement; were we to narrate this procedural odyssey in its entirety, our account would include four transfers to three district court judges, two dismissals from the district court accompanied by two forays into state courts, two changes in the named plaintiffs, and four amended complaints. Only two recent episodes in this circuitous history, however, are directly relevant to the issues that we must decide on appeal today.

First, in May 2000, the district court denied both Ford's motions to dismiss the fourth amended complaint for failure to state a claim and its motion for summary judgment; the district court summarily concluded that after "considering all the applicable law and standards, the Court does not believe this case should be dismissed

---

[3] *See* 18 U.S.C. § 1964(c).

[4] Credit life insurance is insurance on the life of the debtor for the security of the creditor in connection with a loan or other credit transaction.

for failure to state a claim or for any other reason, nor does it believe that summary judgment is appropriate under all the facts and circumstances." Although the district court's order reiterates the parties' claims and defenses, it does not explain the reasoning behind the ruling.

Second, shortly after the district court made that ruling, this case was transferred to another district court judge. In July 2000, the transferee judge, *sua sponte*, ordered the parties to brief the questions "whether federal subject matter jurisdiction is present in this case, and more specifically, whether plaintiff has a viable RICO claim." The transferee judge's directive was motivated by a concession made by Dixon's counsel during oral argument on another motion that "the sole basis for federal jurisdiction in this matter is [the] alleged claim under RICO[.]"

After the parties filed their briefs, the district court issued a ruling that dismissed Dixon's RICO claims with prejudice and dismissed pendent state-law claims without prejudice. In a thorough, well-reasoned opinion, the district court concluded that under *Summit Properties, Inc. v. Hoechst*, which we decided one month after the earlier ruling by the previous judge on the motions to dismiss, a plaintiff must plead detrimental reliance on the predicate mail fraud to state a viable RICO claim.[5] After observing that Dixon had failed to plead such reliance, the district court then went outside the pleadings to find that "[i]n

---

[5] *See* 214 F.3d 556, 562 (5th Cir. 2000).

fact, the representative plaintiffs have testified in depositions that they did not rely on any representations or omissions of the defendants in deciding to purchase credit life insurance," and dismissed Dixon's RICO claims with prejudice. The district court also exercised its discretion to decline supplemental jurisdiction over Dixon's state-law claims, and dismissed them without prejudice.

Dixon now appeals to us, contending, *inter alia,* that the district court (1) erred in dismissing the RICO claims with prejudice after considering evidence outside the pleadings but without providing the required notice or opportunity to respond to that evidence, (2) erred in declining to apply the law-of-the-case doctrine to the previous judge's earlier ruling on the viability of the RICO claims, and (3) abused its discretion in declining to exercise supplemental jurisdiction over the pendent state-law claims. We shall address these issues *seriatim.*

II.

ANALYSIS

A. Standard of Review

We review a grant of summary judgment *de novo,* applying the same standard as the district court.[6] A grant

---

[6] *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). Although the district court styled its decision as a dismissal for lack of subject matter jurisdiction, a reading of the district court's order discloses that the court properly exercised its federal-question jurisdiction and determined that Dixon had failed to establish a claim under the federal statute alleged in the complaint. We have long recognized that "[w]here

of summary judgment is proper only if there is no genuine issue as to any material fact. The movant may demonstrate such a lack by pointing out the absence of evidence to support an essential element of the nonmovant's claim, as "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[7] In deciding whether summary judgment is proper, we must view the facts and the inferences to be drawn from them in the light most favorable to the nonmovant.[8] We review a district court's decision to decline to exercise supplemental jurisdiction over pendent state-law claims for abuse of discretion.[9]

---

the existence of a cause of action is inextricably bound up with the question of this court's subject matter jurisdiction, we treat the dismissal as one on the merits under rule 12(b)(6) or as a grant of summary judgment under Rule 56." *See Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 499-500 n.4 (5th Cir. 1982) (citation omitted). As the district court considered material outside the pleadings in dismissing Dixon's federal claim with prejudice, we treat the dismissal as a summary judgment and review it accordingly. *See* Federal Rule of Civil Procedure 12(b) ("If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]"); *see also Baker v. Putnal*, 75 F.3d 190, 197 (5th Cir. 1996) ("where a district court grants a motion styled as a motion to dismiss but bases its ruling on facts developed outside the pleadings, we review the order as an order granting summary judgment").

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

[8] *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

[9] *Batiste v. Island Records, Inc.*, 179 F.3d 217, 227 (5th Cir. 1999).

B. Summary Judgment on RICO Claims

Dixon argues that the district court erred by granting summary judgment *sua sponte* to Ford on the RICO claims without providing Dixon notice and a reasonable opportunity to respond to the evidence presented by Ford as required under Rules 12(b) and 56. Ford counters that even if Dixon did not receive adequate notice, the grant of summary judgment should nevertheless be upheld under the harmless error standard because a review of all Dixon's additional evidence discloses that there is no genuine issue of material fact.[10] We agree.

Under *Summit*, a plaintiff must demonstrate reliance on the predicate mail fraud to establish the proximate causation required under the RICO statute.[11] Here, the district court concluded that Dixon not only did not but also could not allege reliance, as "the representative plaintiffs have testified in depositions that they did not rely on any representations or omissions of the defendants in deciding to purchase credit life insurance." Even though it is generally true that leave should be liberally

---

[10] *See Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir. 1994).

[11] *See* 214 F.3d at 561-62. Dixon unsuccessfully attempts to evade the clear holding of *Summit* by distinguishing that case on its facts: *Summit*, according to Dixon, involved misrepresentations made to persons other than the plaintiffs, on which the plaintiffs did not rely; here, Dixon claims, "defendants directly participated in the transactions by which [the plaintiffs] were damaged." But *Summit* itself makes clear that "any fraud during the sale of those products proximately injured *only those initial purchasers who relied* on the alleged misrepresentations[.]" *Id.* at 560.

granted to amend pleadings for failure to state a cause of action, under the instant circumstances, when it appears beyond doubt that the plaintiffs can prove no set of facts to support their RICO claims, the grant of summary judgment to the defendants is proper. This is true even if we assume that the plaintiffs did not receive sufficient summary-judgment notice.[12] Accordingly, the district court did not err in granting summary judgment to Ford on Dixon's RICO claims.

C. Law of the Case

Dixon also contends that the law-of-the-case doctrine bars the district court from holding that the plaintiffs' RICO claims are fatally defective. More specifically, Dixon argues that the district court's prior ruling on Ford's motions for dismissal and summary judgment prior to the transfer of the case was "entitled to substantial deference" and should not have been disturbed.

Ford responds, correctly, that under the law-of-the-case doctrine, a successor judge has the same discretion to reconsider an order as would the first judge, although the successor judge should not overrule his predecessor's order or judgment merely because the successor judge

---

[12] *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994) ("When there is no notice to the nonmovant, summary judgment will be considered harmless if the nonmovant has no additional evidence or if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact.") (internal punctuation and citations omitted).

would have decided matters differently.[13] But the doctrine does not apply when the prior decision was erroneous, is no longer sound, or would create injustice.[14] In the instant case, our decision in *Summit*, which clarified that RICO plaintiffs must establish reliance on the predicate mail fraud, was not available for consideration by the predecessor judge in ruling on Ford's motions. Under these circumstances, the law-of-the-case doctrine erected no barrier to the successor judge's consideration of the plaintiffs' ability to state a viable RICO claim in light of *Summit's* supervening clear holding that RICO plaintiffs must allege and prove reliance on the predicate acts of alleged mail fraud.

D. Dismissal of Pendent State-Law Claims

In view of our decision that the district court providently granted summary judgment to Ford on Dixon's federal claims, we need not linger long over Dixon's contention that the district court abused its discretion in declining to exercise supplemental jurisdiction over Dixon's pendent state-law claims. Under 28 U.S.C. § 1367(c)(3), the district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." In general, the dismissal of state-law claims is favored when, as here, (1) the federal claims to which they are pendent are dismissed and (2) the

---

[13] *See United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997).

[14] *See id.*

factors of judicial economy, convenience, and fairness to litigants are not present.[15]

In declining to exercise supplemental jurisdiction in the instant case, the district court emphasized that (1) pretrial preparation "has largely been limited to addressing the jurisdiction issue," (2) the issue of class certification has yet to be addressed, and (3) no trial dates or other deadlines have been established. In addition, the relevant provisions of the Louisiana statute at issue here have yet to be interpreted by a Louisiana court.[16] Under these circumstances, the district court prudently concluded that "in the absence of any valid federal claims and any justification stemming from judicial economy concerns of issues of convenience or fairness to litigants, which might be present if this litigation were more advanced," it should not "needlessly make decisions concerning state law."[17] Accordingly, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Dixon's pendent state-law claims.

---

[15] *See Guzzino v. Felterman*, 191 F.3d 588, 594 (5th Cir. 1999) (citation omitted).

[16] *See* 28 U.S.C. § 1367(c) (listing among the factors which a court must consider in deciding whether to exercise supplemental jurisdiction whether "the state claim raises a novel or complex issue of State law").

[17] *See also Guzzino*, 191 F.3d at 594 ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.") (citation omitted).

III.

CONCLUSION

For the reasons explained above, the district court's grant of summary judgment to Ford on Dixon's RICO claims and its dismissal without prejudice of Dixon's pendent state-law claims are **AFFIRMED.**

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MARION DIXON, ET AL VERSUS FORD MOTOR CREDIT, CO., ET AL CIVIL ACTION NO. 98-2456 c/w 99-1819 SECTION "J"

137 F. Supp. 2d 702; 2000 U.S. Dist. LEXIS 20786

September 14, 2000, Decided
September 15, 2000, Filed, Entered

COUNSEL: For MICHELLE JAMES ORSO, LEROY PERRY, KEVIN DUTHU, plaintiffs (98-CV-2456): James Frederick Willeford, James F. Willeford, Attorney at Law, New Orleans, LA.

For MICHELLE JAMES ORSO, LEROY PERRY, KEVIN DUTHU, plaintiffs (98-CV-2456): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For FORD MOTOR CREDIT COMPANY, defendant (98-CV-2456): Peter A. Feringa, Jr., Betty Finley Mullin, Scott Cameron Barney, Chaffe, McCall, Phillips, Toler & Sarpy, LLP, New Orleans, LA.

For CHRYSLER FINANCIAL CORPORATION, defendant (98-CV-2456): David S. Landry, Sessions, Fishman & Nathan, LLP, New Orleans, LA.

For NISSAN MOTOR ACCEPTANCE CORPORATION, AMERICAN NATIONAL INSURANCE COMPANY, defendants (98-CV-2456): Stephen Winthrop Rider, Anthony J. Rollo, Jr., David S. Willenzik, Lauren Zimmermann Garvey, McGlinchey Stafford, PLLC, New Orleans, LA.

For LOUISIANA DEALER SERVICES INSURANCE, INC., FIRST ASSURANCE LIFE OF AMERICA, defendants (98-CV-2456): H. Alston Johnson, Richard E. Matheny, Jane H. Barney, Phelps, Dunbar, LLP, Baton Rouge, LA.

For LOUISIANA DEALER SERVICES INSURANCE, INC., FIRST ASSURANCE LIFE OF AMERICA, AMERICAN NATIONAL INSURANCE COMPANY, defendants (98-CV-2456): Hansel Mark Harlan, Phelps Dunbar, LLP, New Orleans, LA.

For AMERICAN NATIONAL INSURANCE COMPANY, defendant (98-CV-2456): Scott D. Daniel, Greer, Herz & Adams, Galveston, TX.

For AMERICAN NATIONAL INSURANCE COMPANY, defendant (98-CV-2456): Charles R. Penot, Jr., Stephen Winthrop Rider, Anthony J. Rollo, Jr., David S. Willenzik, Lauren Zimmermann Garvey, McGlinchey Stafford, PLLC, New Orleans, LA.

For CRESCENT BANK & TRUST COMPANY, movant (98-CV-2456): Stephen Winthrop Rider, Anthony J. Rollo, Jr., David S. Willenzik, Lauren Zimmermann Garvey, McGlinchey Stafford, PLLC, New Orleans, LA.

For KEVIN WELLS, JR, plaintiff (99-CV-1819): James Frederick Willeford, James F. Willeford, Attorney at Law, New Orleans, LA.

For KEVIN WELLS, JR, plaintiff (99-CV-1819): Joseph Keith Hardie, Jr., J. Keith Hardie, Jr., Attorney at Law, New Orleans, LA.

For KEVIN WELLS, JR, plaintiff (99-CV-1819): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For LOUISIANA DEALER SERVICES, INC., FIRST ASSURANCE LIFE OF AMERICA, defendants (99-CV-1819): H. Alston Johnson, Richard E. Matheny, Jane H. Barney, Phelps, Dunbar, LLP, Baton Rouge, LA.

For LOUISIANA DEALER SERVICES, INC., FIRST ASSURANCE LIFE OF AMERICA, defendants (99-CV-1819): Hansel Mark Harlan, Phelps Dunbar, LLP, New Orleans, LA.

For CRESCENT CITY NISSAN EAST, defendant (99-CV-1819): Warren Horn, Heller, Draper, Hayden, Patrick & Horn, LLC, New Orleans, LA.

For CRESCENT CITY NISSAN EAST, defendant (99-CV-1819): Scott William McQuaig, Colette C. Ranatza, McQuaig & Stelly, Metairie, LA.

JUDGES: Carl J. Barbier, UNITED STATES DISTRICT JUDGE.

OPINION BY: Carl J. Barbier

OPINION: JUDGMENT

Considering the court's order dated September 8, 2000, filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Ford Motor Credit, Co., Chrysler Financial Corporation, Nissan Motor Acceptance Corporation, Louisiana Dealer Services Insurance, Inc., First Assurance Life of America, American National Insurance Company, Crescent City Nissan

East, and against plaintiffs, Michelle James Orso, Leroy Perry, Kevin Duthu, and Kevin Wells, Jr, dismissing the plaintiffs' suit with prejudice as to the *18 U.S.C. 1962*(c) & (d) claims and without prejudice as to the pendent state court claims.

New Orleans, Louisiana, this 14th day of SEPTEMBER, 2000.

Carl J. Barbier

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MARION DIXON, ET AL VERSUS FORD MOTOR CREDIT CO., ET AL CIVIL ACTION NO: 98-2456 C/W 99-1819 SECTION: "J"(5)

137 F. Supp. 2d 702; 2000 U.S. Dist. LEXIS 20789

September 8, 2000, Decided
September 11, 2000, Entered

DISPOSITION: Plaintiffs' claims in these consolidated cases brought pursuant to 18 U.S.C. § 1962(c) & (d) DISMISSED with prejudice; Plaintiffs' pendent state law claims in these consolidated cases DISMISSED without prejudice for lack of subject matter jurisdiction.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs sued defendant credit company and separate enterprise, alleging federal RICO claims, under 18 U.S.C.S. § 1962(c), (d), and state-law claims. Before the court was the issue of whether plaintiffs stated RICO claims.

OVERVIEW: Plaintiffs alleged that defendant credit company, a RICO person, participated directly or indirectly in the conduct of defendant separate enterprise, through a pattern of racketeering activity. The predicate acts which formed the pattern of racketeering activity alleged were wire and mail fraud, comprised of the collecting of credit information and the mailing of documents between defendant credit company and separate enterprise in furtherance of the alleged conspiracy to defraud plaintiffs by inducing them to buy unnecessary credit life insurance.

The court found that plaintiffs had failed to state a federal RICO claim. As to § 1962(c), plaintiffs conceded they did not rely on defendants' mail fraud, and in fact, did not rely on any representations or omissions made by defendants in purchasing credit life insurance. The § 1962(d) claim failed because plaintiffs' amended complaint did not contain allegations pursuant to 18 U.S.C.S. § 1962(a) or (b) and because the § 1962(c) claim had failed. The court declined to exercise supplemental jurisdiction over the state-law claims, as pre-trial preparation had been largely limited to addressing the jurisdiction issue.

OUTCOME: Plaintiffs' RICO claims were dismissed with prejudice. Plaintiffs' state-law claims were dismissed without prejudice.

CORE CONCEPTS –

COUNSEL: For MICHELLE JAMES ORSO, LEROY PERRY, KEVIN DUTHU, plaintiffs (98-CV-2456): James Frederick Willeford, James F. Willeford, Attorney at Law, Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For FORD MOTOR CREDIT COMPANY, defendant (98-CV-2456): Peter A. Feringa, Jr., Betty Finley Mullin, Scott Cameron Barney, Chaffe, McCall, Phillips, Toler & Sarpy, LLP, New Orleans, LA.

For CHRYSLER FINANCIAL CORPORATION, defendant (98-CV-2456): David S. Landry, Sessions, Fishman & Nathan, LLP, New Orleans, LA.

For NISSAN MOTOR ACCEPTANCE CORPORATION, AMERICAN NATIONAL INSURANCE COMPANY, defendants (98-CV-2456): Stephen Winthrop Rider, Anthony J. Rollo, Jr., David S. Willenzik, Lauren Zimmermann Garvey, McGlinchey Stafford, PLLC, New Orleans, LA.

For LOUISIANA DEALER SERVICES INSURANCE, INC., FIRST ASSURANCE LIFE OF AMERICA, defendants (98-CV-2456): H. Alston Johnson, Richard E. Matheny, Jane H. Barney, Phelps, Dunbar, LLP, Baton Rouge, LA.

For LOUISIANA DEALER SERVICES INSURANCE, INC., FIRST ASSURANCE LIFE OF AMERICA, AMERICAN NATIONAL INSURANCE COMPANY, defendants (98-CV-2456): Hansel Mark Harlan, Phelps Dunbar, LLP, New Orleans, LA.

For AMERICAN NATIONAL INSURANCE COMPANY, defendant (98-CV-2456): Scott D. Daniel, Greer, Herz & Adams, Galveston, TX.

For AMERICAN NATIONAL INSURANCE COMPANY, defendant (98-CV-2456): Charles R. Penot, Jr., McGlinchey Stafford, PLLC, New Orleans, LA.

For CRESCENT BANK & TRUST COMPANY, movant (98-CV-2456): Stephen Winthrop Rider, Anthony J. Rollo, Jr., David S. Willenzik, Lauren Zimmermann Garvey, McGlinchey Stafford, PLLC, New Orleans, LA.

JUDGES: CARL J. BARBIER, UNITED STATES DISTRICT JUDGE.

OPINION BY: CARL J. BARBIER

OPINION: ORDER DISMISSING CASE

On July 21, 2000, this Court entered an order directing the parties to brief the question whether subject matter jurisdiction existed for plaintiffs' suit. Subsequently, the parties timely filed briefs directed to this issue. The Court's directive was motivated by counsel for plaintiffs' concession, during oral argument held on another motion on July 19, 2000, that the federal RICO statute provides the sole basis for federal subject matter jurisdiction, coupled with defendants' assertions that plaintiff had failed entirely to state a claim under RICO. Cognizant of the fact that courts have a continuing duty to inquire into their own subject matter jurisdiction,[1] the Court determined that it would be prudent to resolve the question before additional and possibly unnecessary proceedings take place.

The lengthy procedural background and surrounding facts have been set forth in detail in prior orders of the Court, so they will not be restated here. For present purposes, it is sufficient to know that plaintiffs have in fact conceded that federal subject matter jurisdiction is hinged on RICO, and plaintiffs' RICO claims are brought pursuant to 18 U.S.C. § 1962(c) & (d).[2]

---

[1] See *Fax Telecommunications, Inc. v. AT&T*, 138 F.3d 479, 485 (2d Cir. 1998); Fed. R. Civ. P. 12(h)(3).

[2] Following the Court's December 30, 1999 finding that diversity jurisdiction was not present in this case (Rec. Doc. 72), plaintiff filed a 3rd Amended Complaint alleging causes of action under RICO on March 12, 1999. Rec. Doc. 103. Following this Court's April 21, 1999 dismissal of a similar case brought by plaintiffs' counsel, *Perrin v. First Money, LLC*, 1999 U.S. Dist. LEXIS 6039, 98-1736, based on the Court's finding that the *Perrin* plaintiffs had failed to state a claim under 18 U.S.C. § 1962

I. Section 1962(c) Claims

Title 18 § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

To succeed in a claim under this provision, a plaintiff must demonstrate "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985). To show a pattern of racketeering activity, a plaintiff must show at least two predicate racketeering acts that are related and that either amount to, or threaten the likelihood of, continued criminal activity. *H.J. v. Northwestern Bell*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Mail fraud in violation of 18 U.S.C. § 1341 qualifies as a predicate act for a RICO claim. 18 U.S.C. § 1961.

(a)-(d), plaintiffs filed their 4th Amended Complaint in the instant action foregoing claims under § 1962(a) & (b) and containing expanded allegations under § 1962(c), and under § 1962(d).

A. RICO Allegations of the 4th Amended Complaint

In the instant case, plaintiffs have made the following allegations against the defendants in support of their § 1962(c) claims:

With respect to defendant Ford Motor Credit Company ("Ford"), plaintiff alleges that Ford, a RICO person, participates directly or indirectly in the conduct of the separate enterprise, LaMarque Ford, Inc. ("LaMarque"), through a pattern of racketeering activity. The predicate acts which form the pattern of racketeering activity alleged are wire and mail fraud, comprised of the collecting of credit information and the mailing of documents[3] between Ford and LaMarque in furtherance of the alleged conspiracy to defraud plaintiffs by inducing them to buy unnecessary credit life insurance. 4th Am. Complaint, PP 15-18.

With respect to defendant Chrysler Financial Corporation ("CFC"), plaintiff alleges that CFC, a RICO person, participates directly or indirectly in the conduct of the separate enterprise, Ray Brandt Dodge, Inc. and Julian Graham Dodge Inc. (collectively, "Dodge dealers"), through a pattern of racketeering activity. The predicate acts which form the pattern of racketeering activity alleged are wire and mail fraud, comprised of the collecting of credit information and the mailing of documents between CFC and the Dodge dealers in furtherance of the

---

[3] The documents mailed between the various parties named in plaintiffs' complaints consisted of certificates of insurance, policy numbers, payments, delinquency notices, credit life applications, monthly reports, etc.

alleged conspiracy to defraud plaintiffs by inducing them to buy unnecessary credit life insurance. 4th Am. Complaint, PP 19-23.

With respect to defendant Nissan Motor Acceptance Corporation ("NMAC"), plaintiff alleges that NMAC, a RICO person, participates directly or indirectly in the conduct of the separate enterprise, Ray Brandt Nissan, Inc. ("Ray Brandt"), through a pattern of racketeering activity. The predicate acts which form the pattern of racketeering activity alleged are wire and mail fraud, comprised of the collecting of credit information and the mailing of documents between NMAC and Ray Brandt in furtherance of the alleged conspiracy to defraud plaintiffs by inducing them to buy unnecessary credit life insurance. 4th Am. Complaint, PP 24-27.

With respect to defendants Louisiana Dealer Services Insurance, Inc. ("LDS") and First Assurance Life of America ("FALA"), plaintiff alleges LDS and FALA, RICO persons, participate directly or indirectly in the conduct of separate enterprises, the Dodge dealers and Ray Brandt, through a pattern of racketeering activity. The predicate acts which form the pattern of racketeering activity alleged are mail fraud, comprised of the mailing of documents between LDS and FALA and the Dodge dealers, Ray Brandt, and others in furtherance of the alleged conspiracy to defraud plaintiffs by inducing them to buy unnecessary credit life insurance. 4th Am. Complaint, P 28.

With respect to defendant American National Insurance Company ("ANICO"), plaintiffs allege that ANICO, a RICO person, participates directly or indirectly in the

conduct of the separate enterprise, LaMarque, through a pattern of racketeering activity. The predicate acts which form the pattern of racketeering activity alleged are mail fraud, comprised of the mailing of documents between ANICO and LaMarque in furtherance of the alleged conspiracy to defraud plaintiffs by inducing them to buy unnecessary credit life insurance. 4th Am. Complaint, P 30.

In the consolidated Wells action, the Wells Complaint alleges that LDS and FALA, RICO persons, participate directly or indirectly in the conduct of the separate enterprise, Crescent City Nissan ("Crescent City"), through a pattern of racketeering activity. The predicate acts which form the pattern of racketeering activity alleged are wire and mail fraud, comprised of the collection of credit information and mailing of documents between LDS and FALA and Crescent City in furtherance of the alleged conspiracy to defraud plaintiffs by inducing them to buy unnecessary credit life insurance. Wells Complaint, PP 16-17.

Finally, in plaintiffs' RICO case statements filed in both the Dixon and Wells actions, plaintiffs allege that "without the use of the mails for monthly installment payments of retail installment contracts, plaintiffs would not incur damages. . . . " Rec. Docs. 151 & 156, P 9.[4]

---

[4] Because plaintiffs' RICO case statements refer only to mail fraud as a "but for" cause of their injuries, and because plaintiffs' Supplemental Brief Addressing Subject Matter Jurisdiction emphasizes only mail fraud, for convenience and economy, the Court limits its discussion here to predicate acts of mail fraud. However, the Court observes that its findings herein

B. Arguments of the Parties

Defendants argue, inter alia, that while the foregoing allegations, even if true, assert that plaintiffs' damages were caused by the alleged predicate acts (mail fraud) of defendants, they do not state a claim under § 1962(c) because they neglect to allege that plaintiffs detrimentally relied on misrepresentations or omissions in the fraudulent mailings, and in fact, plaintiffs have admitted that they did not detrimentally rely on defendants' alleged mail fraud. In so arguing, defendants point the Court to the Fifth Circuit's recent decision in *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000).

In contrast, while plaintiffs concede that they did not detrimentally rely on misrepresentations or omissions in defendants' mail fraud, they argue that

> *Summit* is inapposite to the instant action, because in *Summit* the plaintiffs alleged that their damages were the result of misrepresentations. . . . In this action, plaintiffs alleged that their damages are proximately caused by defendants' predicate acts, specifically, their use of the mails in connection with a scheme to defraud, without which the fraud would not occur.

Plaintiffs' Supplemental Brief Addressing Subject Matter Jurisdiction, 14.

---

are equally applicable to plaintiffs' allegations to the extent the predicate acts may be wire fraud.

Accordingly, the Court is called upon to examine the Fifth Circuit's decision in *Summit*, and whether and to what extent is applicable to the case at bar.

C. The *Summit* Decision

In *Summit*, a products liability case, the owners of properties in which polybutylene ("PB") plumbing systems had been installed sued manufacturers of PB plumbing systems and their components under RICO, alleging fraud in the marketing of PB. Plaintiffs argued that the defendants conspired to defraud them by directing a massive marketing campaign designed to establish PB as a superior plumbing product, when in fact, PB possesses inherent defects which make it unsuitable for plumbing, including the fact that PB systems degrade, crack, leak, and spray water. 214 F.3d at 558. In making their case, the *Summit* plaintiffs conceded that they " 'did not rely on anything Defendants said or published in purchasing their properties.' " *Id.* at 559, quoting Plaintiffs' Memo. Instead, much like the plaintiffs here, they argued that "individual acts of reliance are simply unnecessary in order to recover for damages resulting from civil RICO fraud." *Id.* at 560. Also like plaintiffs herein, their arguments relied heavily on the (undisputedly correct) legal proposition that reliance is not necessary for violation of the federal mail fraud statute. *Armco Industries Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475 (5th Cir. 1986).[5]

---

[5] The elements of mail fraud in violation of 18 U.S.C. § 1341 are (1) the existence of a scheme to defraud; (2) the use of the mails to execute the scheme; and (3) the specific intent on the

RICO provides a private, civil cause of action to "any person injured in his business or property by reason of a violation of section 1962. . . . " 18 U.S.C. § 1964(c)(emphasis added). As reiterated in *Summit*, the Supreme Court has previously held "that the 'by reason of' language in RICO requires a causal connection between the predicate mail or wire fraud and a plaintiff's injury that includes 'but for' and 'proximate' causation." *Summit*, 214 F.3d at 558, citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). Accordingly, the Fifth Circuit acknowledged that while "the government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance," a civil plaintiff must show causation. 214 F.3d at 559 (emphasis supplied). In embracing this reasoning, the Fifth Circuit rejected the *Summit* plaintiffs' attempt to reduce the question to whether the elements of mail fraud were present, and instead framed the issue before it as whether a plaintiff must show reliance in order to establish the proximate cause necessary to state a RICO claim, when the predicate acts alleged are mail fraud or wire fraud.

In conducting its analysis, the Fifth Circuit took cognizance of its prior decision in *Armco*. In *Armco*, the court upheld a district court's refusal to charge a jury that reliance was necessary to show proximate cause in a RICO case predicated on mail fraud. The *Summit* court pointed out, however, that *Armco* did not squarely address whether proximate cause was required for a

---

part of the defendant to commit fraud. *U.S. v. Brown*, 186 F.3d 661, 665 (5th Cir. 1999).

RICO claim, and to the extent it may have suggested that it was not, it was overruled by the Supreme Court's subsequent opinion in *Holmes v. Securities Investor Protection Corp.*, which established the proximate cause requirement in *RICO cases*. 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). Thus, in addressing the question presented in *Summit* – whether reliance is necessary for proximate cause – the Fifth Circuit was not constrained in any way by the prior holding in *Armco* or the fact that reliance is not an element of mail fraud under 18 U.S.C. § 1341.

The Summit court, following the example of other circuits,[6] answered the question in the affirmative. In so holding, it relied upon the directive in *Holmes* that "federal courts [should] employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation." 214 F.3d at 560, citing *Holmes*, 503 U.S. at 268, 112 S. Ct. 1311.

The court's stated rationale for its conclusion was the causal link, in a fraud claim, between a defendant's fraud and a plaintiff's injuries. *Id.* As the court noted, "the causal connection between a misrepresentation and a

---

[6] In particular, the court pointed to *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Central Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir. 1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); and *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989).

subsequent harm . . . vanishes once the product travels beyond the entity who actually relied on the representation when making the decision." *Id.* While this particular formulation reached in *Summit* was made in the context of a products liability claim, the reasoning informing it is no less applicable here. The mere fact that defendants mailed documents incidental to their business, legitimate or illegitimate, does not answer the question of whether the fraud was the proximate cause of plaintiff's injuries. The Court acknowledges that sorting out RICO liability can be confusing, since RICO codifies a Congressional intent to provide a private civil cause of action for criminal activity. However, the fact remains that mail fraud schemes (and for that matter, all manner of crimes) can be occurring around us everyday, and while their mere existence provides the Government a right to prosecute the perpetrators, it does not provide a private civil cause of action for an individual plaintiff until the fraud has actually injured him or her. For this reason, reliance is necessary to establish proximate cause in a civil RICO action predicated upon mail fraud.

D. Application to the Present Case

In the case at bar, plaintiffs concede that they did not rely on any representations or omissions[7] made as part of

---

[7] Plaintiffs' counsel, in some pleadings, has attempted to distinguish the instant case, in which plaintiffs allege material omissions were made, from cases involving alleged misrepresentations (as happened in *Summit*), and seems to suggest that "reliance" does not come into play in omissions cases. This court has previously rejected this argument by

defendants' alleged mail fraud. In fact, the representative plaintiffs have testified in depositions that they did not rely on any representations or omissions of the defendants in deciding to purchase credit life insurance, and that they would not necessarily have foregone purchasing the credit life insurance had they known the details which they allege were not, but should have been disclosed. For instance, when asked "What do you believe would have changed your mind, if anything, about whether to buy credit life insurance the day you bought the car if you had been told it?", plaintiff Kevin Duthu candidly admitted "I don't know whether or not I would have had a change of decision."[8] Similarly, plaintiff Michelle Orso responded to the query: "So you are not saying that if you had been told that you were buying it, that you wouldn't have bought it?" by saying "No, that is not what I'm saying."[9] She also admitted that she didn't know whether she would have changed her mind had she known the percentage of the commission, and that the issue of the agent's commission did not a factor in her decision to purchase the insurance.[10] Wells testified that he did not read the Retail Install Contract before he signed it, even though the salesperson suggested that he

---

plaintiff in an earlier dismissed precursor suit to the instant suit. *See Young v. Ray Brandt Dodge, Inc.*, 176 F.R.D. 230 (E.D. La. 1997). Reliance in an omissions case is demonstrated when a claimant establishes that had it known of the alleged undisclosed facts, he or she would have taken a different course of action.

[8] Duthu Depo., 88-89.

[9] Orso Depo., 77-78.

[10] *Id.* at 79-80.

read it, and that had he read the portion discussing the insurance policies (which he acknowledged was written in "plain English"), he would not have purchased the insurance."[11] He also candidly acknowledged that "if I would of [sic] read it, I would not be here [involved in this lawsuit]."[12] Thus, not only have plaintiffs failed to establish that defendants' predicate racketeering activity (i.e., the alleged mail fraud) proximately caused their alleged injuries by inducing them to buy the insurance, it is unclear whether any representations or omissions of the defendants made to them were a factor in deciding to purchase the insurance.

The Court is aware that notwithstanding the plaintiffs' concession that they did not rely on defendants' alleged mail fraud, they have stated, in a conclusory fashion, that the defendants' alleged racketeering activity was a "but for" cause of their injuries,[13] and that but for plaintiffs' use of the mails to send payments, the sale of the credit life insurance would not have occurred.[14] This argument is flawed because, since plaintiffs have conceded that they did not rely on the alleged mailings,[15] there is no way to know if they would have purchased the insurance absent the mailings or not, and the Court

---

[11] Wells Depo., 150-52.

[12] *Id.* at 150.

[13] *See* 4th Am. Complaint, PP 16, 20, 25, 29, & 31; Wells Complaint, P 21.

[14] RICO Case Statements, Rec. Docs. 151 & 156, P 9.

[15] In fact, it is highly unlikely that plaintiffs even knew of the occurrence or content of defendants' routine business mailings.

cannot fathom how the mailing of routine business forms and the like would influence plaintiffs' decision to purchase credit life insurance. As for the mailing of payments, this is not a sine qua non of the fraud alleged by plaintiffs – while it would certainly be burdensome, plaintiffs could have paid their bills in person or through a "drop box", and in fact, many bills are paid that way. Most important however, even if plaintiffs' "but for" arguments were true, that would not be enough to impose liability on defendants, because "a cause-in-fact connection, standing alone, does not suffice to establish [RICO] liability." *Zervas v. Faulkner*, 861 F.2d 823, 834 (5th Cir. 1988) (citations omitted); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 1317-18, 117 L. Ed. 2d 532 (1992).

In sum, under *Holmes* and *Zervas*, a plaintiff must show proximate cause to recover under RICO on a claim predicated on mail fraud. To show proximate cause in such a case, plaintiffs must demonstrate reliance on defendants' mail fraud. *Summit*, 214 F.3d at 562. Plaintiffs herein have conceded they did not rely on defendants' mail fraud, and in fact, did not rely on any representations or omissions made by defendants in purchasing credit life insurance. Accordingly, plaintiffs cannot state a claim under 18 U.S.C. § 1962(c).

II. Section 1962(d) Claims

Subsection 1962(d) makes it unlawful "for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of [section 1962]." 18 U.S.C. § 1962(d). Thus, in the absence of valid claims under subsections (a), (b),

and (c), a claim under subsection (d) must also fail. *Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993). The Fourth Amended Complaint does not contain any allegations pursuant to subsection (a) or (b), and as the foregoing analysis bears out, plaintiffs cannot state a claim under subsection (c); accordingly, plaintiffs' claims under subsection (d) must also be dismissed. Therefore, lacking a viable claim under any provision of RICO, plaintiffs' Fourth Amending Complaint does not present a federal question that would confer original subject matter jurisdiction over this action.

III. Supplemental Jurisdiction

Plaintiffs also argue that the Court may exercise its supplemental jurisdiction over their claims, pursuant to 28 U.S.C. § 1367. Title 28 U.S.C., section 1367 provides in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection

(a) if –

(1) the claim raises a novel or complex issue of State law;

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;

(3) the district court has dismissed all claims over which it has original jurisdiction; or

(4) in exceptional circumstances there are other compelling reasons for declining jurisdiction.

When the facts of an individual case indicate that extensive pretrial preparation has been conducted in federal court which would have limited utility in state court, a federal district court may abuse its discretion in dismissing or remanding the case on the eve of trial. *See Newport Ltd. v. Sears, Roebuck and Co.*, 941 F.2d 302 (5th Cir. 1991). However, the "general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed." *Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992). The "justification for pendent jurisdiction lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them." *Guzzino v. Felterman*, 191 F.3d 588, 594. (5th Cir.1999) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)).

In the instant case, all federal claims have been dismissed, and pre-trial preparation has largely been limited to addressing the jurisdiction issue. In fact, the issue of

class certification has not been addressed and no trial dates or other deadlines have been established. Thus, in the absence of any valid federal claims and any justification stemming from judicial economy concerns or issues of convenience or fairness to litigants, which might be present if this litigation were more advanced, the Court finds that it should not needlessly make decisions concerning state law, and pursuant to 28 U.S.C. § 1367(c)(3), it declines to exercise supplemental jurisdiction.

IV. Conclusion

Plaintiffs' sole basis for federal question jurisdiction is premised upon their RICO claims. However, as the foregoing analysis demonstrates, "it appears beyond doubt that plaintiff[s] can prove no set of facts in support of [their] claims that would entitle them to relief" under RICO, and thus the RICO claims must be dismissed. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). Further, the Court has declined to exercise its supplemental jurisdiction over plaintiffs' pendent state law claims. Therefore, this action must be dismissed.

The Court is aware that plaintiffs' counsel contends that because the law of the case applies to decisions of subject matter jurisdiction, this Court should not revisit the earlier decision of Judge Mitchell finding that subject matter jurisdiction was present and that the action should not be dismissed. However, Judge Mitchell's opinion was rendered on May 31, 2000, shortly before the Fifth Circuit decision in *Summit* (rendered June 7, 2000), and no arguments regarding the reliance requirement to establish proximate cause in RICO claims predicated on mail fraud

were considered by him in making his ruling. Thus, there is no pre-existing law of the case on this point.

Accordingly;

IT IS ORDERED that plaintiffs' claims in these consolidated cases brought pursuant to 18 U.S.C. § 1962(c) & (d) should be and are hereby DISMISSED with prejudice;

IT IS FURTHER ORDERED that plaintiffs' pendent state law claims in these consolidated cases should be and are hereby DISMISSED without prejudice for lack of subject matter jurisdiction.

New Orleans, Louisiana, this 8th day of September, 2000.

CARL J. BARBIER

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MARION DIXON, ET AL. VERSUS FORD MOTOR CREDIT, ET AL.

CIVIL ACTION No. 98-2456 c/w 99-1819
SECTION "LLM"

2000 U.S. Dist. LEXIS 7934

May 31, 2000, Filed, Entered

DISPOSITION: Ford Motor Credit Company's Motion for Summary Judgment as to plaintiffs' fourth amended complaint DENIED.

COUNSEL: For MICHELLE JAMES ORSO, LEROY PERRY, KEVIN DUTHU, plaintiffs (98-CV-2456): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For FORD MOTOR CREDIT COMPANY, defendant (98-CV-2456): Peter A. Feringa, Jr., Betty Finley Mullin, Scott Cameron Barney, Chaffe, McCall, Phillips, Toler & Sarpy, LLP, New Orleans, LA.

For CHRYSLER FINANCIAL CORPORATION, defendant (98-CV-2456): David S. Landry, Sessions & Fishman, New Orleans, LA.

For NISSAN MOTOR ACCEPTANCE CORPORATION, AMERICAN NATIONAL INSURANCE COMPANY, defendants (98-CV-2456): Stephen Winthrop Rider, Anthony J. Rollo, Jr., Lauren Zimmermann Garvey, McGlinchey Stafford, PLLC, New Orleans, LA.

For LOUISIANA DEALER SERVICES INSURANCE, INC., FIRST ASSURANCE LIFE OF AMERICA, defendants (98-

CV-2456): Richard E. Matheny, Jane H. Barney, Phelps, Dunbar, LLP, Baton Rouge, LA.

For FIRST ASSURANCE LIFE OF AMERICA, AMERICAN NATIONAL INSURANCE COMPANY, defendants (98-CV-2456): Hansel Mark Harlan, Phelps Dunbar, LLP, New Orleans, LA.

For AMERICAN NATIONAL INSURANCE COMPANY, defendant (98-CV-2456): Scott D. Daniel, Greer, Herz & Adams, Galveston, TX.

For AMERICAN NATIONAL INSURANCE COMPANY, defendant (98-CV-2456): Charles R. Penot, Jr., McGlinchey Stafford, PLLC, New Orleans, LA.

JUDGES: Lansing L. Mitchell, UNITED STATES SENIOR DISTRICT JUDGE.

OPINION BY: Lansing L. Mitchell

OPINION: ORDER AND REASONS

As stated in Judge Barbier's Minute Entry of December 29, 1998, procedurally, the matter now before the Court is the product of a long and tortured history. Without reiterating every previous complaint and motions filed in response thereto, the Court will simply note that on June 2, 1999, Judge Barbier issued a Minute Entry in which he granted plaintiff's Motion for Leave to File a 4th Amended Class Action Complaint. In that same Minute Entry, he denied motions by defendants' Ford Motor Credit Company, Chrysler Financial Corporation and Nissan Motor Acceptance Corporation to dismiss plaintiff's third amended class-action complaint. He also denied defendant Ford Motor Credit Company's Motion for Summary Judgement as to plaintiff's third amended

complaint. These motions were all denied as moot, without prejudice to defendant's right to re-urge them in response to the fourth amended complaint.

This matter is now before this Court on Motions to Dismiss the Fourth Amended Complaint filed by defendants Nissan Motor Acceptance Corporation, American National Insurance Company, Chrysler Financial Corporation, First Assurance Life, and Ford Motor Credit Company; it is also before the Court on Ford Motor Credit Company's Motion for Summary Judgment as to plaintiffs' fourth amended complaint.

Fourth Amended Restated Class Action Complaint

Plaintiffs' bring their complaint pursuant to the provision of 18 USC § 1962, et seq. (The Racketeer Influenced and Corrupt Organizations Act [RICO]). They assert this Court has jurisdiction over this matter under 28 USC § 1331 (Federal Question) and under 28 USC § 1367 (Supplemental Jurisdiction).[1] The representative plaintiffs, Michelle James Orso, Leroy Perry, and Kevin Duthu, are all persons of majority domiciled in the Eastern District of Louisiana. The former representative plaintiffs

---

[1] 28 USC § 1367 provides in pertinent part . . . In any civil action which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claimsthat involve the joinder or intervention of additional parties. (Emphasis added).

were Marion Dixon and Beverly Schneider, who are also persons of majority domiciled in the Eastern District of Louisiana. The defendants, Ford Motor Credit Company (Ford Credit), Chrysler Financial Corporation (Chrysler Financial), Nissan Motor Acceptance Corporation (Nissan Acceptance), Louisiana Dealer Services Insurance (Louisiana Dealer), First Assurance Life of American (First Assurance), American National Insurance Company (ANICO), are corporations organized under laws of various states, who do business throughout the state of Louisiana, including the Eastern District of Louisiana.

Plaintiffs are all proposed class members or persons who purchased credit financing from defendants' Ford Credit, Chrysler Financial, or Nissan Acceptance, in connection with vehicle financing or are persons who co-signed obligations on retail installment contracts (RIC) evidencing such purchases. The credit was used to finance to vehicles, and premiums for policies of credit life insurance, purchased from vehicle dealers in Louisiana. The financing is provided by means of RICs. The form RIC contracts are provided to the vehicle dealers by one of the defendants, Ford Credit, Chrysler Financial, or Nissan Acceptance. The policies of credit life insurance were underwritten by defendants First Assurance, Louisiana Dealer or ANICO.

Because this case contains a civil RICO claim, plaintiffs were ordered to comply with this Court's RICO STANDING ORDER. Rec. Doc. 143. Plaintiffs', Orso, Perry, and Duthu filed their required RICO Case Statement on July 8, 1999. Plaintiff, Kevin Wells, Jr.(Wells), in consolidated Civil Action No. 99-1819, filed his RICO case statement on August 2, 1999. Rec. Doc. No. 156.

Defendants' Motions to Dismiss

In essence, defendants submit their Federal Rule of Civil Procedure (FRCP) 12(b)(6) Motions to Dismiss all claims asserted against them for failure to state a claim upon which relief can be granted. Plaintiffs bought automobiles from various automobile dealerships, and credit life insurance policies from various defendant insurance companies. Plaintiffs financed the purchase price of both the car and the insurance by executing an RIC, and the dealer later assigned the RICs to one of the defendant finance companies. Plaintiffs claim that a state statute, the Louisiana Motor Vehicle Sales Finance Act (LMVSFA), La.R.S. 6:951 et seq., does not permit the sale of credit life insurance of the type that was sold to them, and the LMVSFA requires certain additional disclosures in the loan documents. Plaintiffs filed both state law claims and federal claims under RICO, and are attempting to assert all claims by means of a class action.

Defendants assert that the LMVSFA permits the sale of the type of credit life insurance purchased by plaintiffs, and that the loan documents contained all disclosures mandated by the LMVSFA. Defendants also asserts that plaintiffs fail to state a claim under 18 USC §§ 1962(c) and (d) of the RICO statute.[2]

---

[2] 18 USC § 1962(c) states "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 USC § 1962(d) states "It shall be unlawful for any person to conspire

Defendants maintain, first of all, that the LMVSFA specifically permits the sale of the credit life insurance that was sold to plaintiffs and does not require the disclosures that plaintiffs maintain are necessary in the RICs themselves. Defendants maintain that their conduct is specifically permitted by Louisiana statutory law. They further maintain that when the law expressly permits certain conduct, federal courts have refused to recognize such conduct as the basis for mail or wire fraud claims under RICO.

Defendants also asserts that plaintiffs failed to state a claim under 18 USC §§ 1962(c) and (d) of the RICO statute. Defendants allege that plaintiffs' § 1962(c) claim fails for three reasons: first, the fourth amended complaint is inadequate because it fails to satisfy the distinctiveness requirement of a § 1962(c) claim; second, plaintiffs have failed to allege adequately that the defendants conducted the affairs of the alleged enterprises sufficient to state a § 1962(c) claim; and third, as set forth above, because the LMVSFA specifically permits the sale of the credit life insurance that was sold to plaintiffs and does not require the disclosures that plaintiffs maintains are necessary in the RICs themselves.

Plaintiffs contends that Section 956(f)(1) and (f)(2) of the LMVSFA require that credit life insurance coverage be limited to only the amount of the unpaid principal balance owed under an RIC, and that the credit life insurance premium may be calculated only on the basis of the

---

to violate any of the provisions of subsection (a), (b), or (c) of this section."

initial principal balance owed under that contract. Plaintiffs further claim that Section 956(f)(6) of the LMVSFA was violated because the kind, amount of premium, coverage, and term of credit insurance was not clearly indicated on the face of their RICs. Further, to the extent defendants argue that these provisions required by Section 956(f)(6) were provided in part in the insurance "agreements," and not the RICs, plaintiffs vehemently deny that this satisfies the requirements of that section.

The gravamen of plaintiffs' response to the arguments presented by the defendants in their various motions is that plaintiffs' Complaint sufficiently alleges enterprises, in the conduct of which all defendant continue to participate, in violation of the RICO statute. Plaintiff contends that the recent revisions to the LMVSFA did not change the law, and the revisions do not permit credit life insurance to be sold to include unearned interest on a retail installment contract (because unearned interest is never included in the "total sum payable" nor in the finance charge, nor in the credit service charge). Defendants' arguments with respect to the RICO pattern/continuity requirement are, therefore, unavailing. Plaintiff maintains that defendants' sale of excessive amounts of credit life insurance continues to violate the LMVSFA, as it always has.

Moreover, plaintiffs assert that defendants' material omissions in failing to disclose commissions to vehicle dealers in excess of 65%, and sometimes over 70%, of the insurance commission, are equally the basis of plaintiffs' RICO claims, in that defendants use the mails and interstate wires in connection with their scheme to defraud the consumers by this non-disclosure. *See Gibson v. Bob*

Watson Chevrolet, 112 F.3d 283 (7th Cir. 1997) (even disclosing that dealer may be retaining a portion of the charge, without disclosing the amount dealer is retaining, may be farther than the statute, [in that case, the Truth-in Lending-Act], will stretch). Plaintiffs argue, persuasively, that when the amount retained by the dealer as a commission is up to 73% the amount of the premium, and this fact is not disclosed to the consumers, this may indeed be farther than the RICO statute will stretch.

Plaintiff contends that this "commission" to the dealer underscores the fraudulent nature of the enterprise alleged. "The excessive commission induces the vehicle dealer to sell excessive amounts of credit insurance, which benefits the dealer (through commissions), the lender (through interest on the excessive insurance, as well as the undisclosed commission), and the credit insurer (through excessive premiums to insure the risk of paying unearned interest, which is never owed under the provisions of La.R.S. § 6:969.20 [formerly § 6:958]). No part of the enterprise could function as it does without the other. . . . Without the use of the mails, to transmit monthly payments, and interstate wires to communicate credit information and funds transfers by computer, defendants' fraudulent scheme would not function. It is the fraudulent nondisclosure of commissions, as well as the excessive sale of credit life insurance, which forms the basis of plaintiffs' RICO claims." (Plaintiffs' Reply to Defendants' Supplemental Memoranda in Support of their Rule 12(b)(6) Motions to Dismiss, pp. 7-8). *See U.S. v. Brown*, 186 F.3d 661 (5th Cir.1999) (court approved eighteen instances of overcharging against defendant [owner or manager of automobile dealership] as mail

frauds, because the Louisiana Department of Motor Vehicles mailed the automobile titles. . . . [and] because SCG mailed loan documentation to General Motors Acceptance Corporation [the lender]). *Id.* at 663.

The Fifth Circuit in *U.S. v. Brown, supra,* affirmed the mail fraud convictions, thereby finding that the scheme alleged was sufficient to support RICO pattern and continuity requirements, even though the fraudulent transactions were finite, and limited in number.

This Court has exhaustively reviewed the numerous memoranda and exhibits submitted in connection with these motions, as well as the applicable law. Defendants and plaintiffs have thoroughly and correctly stated the legal standards a Court must follow when considering motions to dismiss and motions for summary judgment, and the Court sees no reason to reiterate them. Suffice it to say, considering all the applicable law and standards, the Court does not believe this case should be dismissed for failure to state a claim or for any other reason, nor does it believe that summary judgment is appropriate under all the facts and circumstances.

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED that the Motions to Dismiss the Fourth Amended Complaint filed by defendants Nissan Motor Acceptance Corporation, American National Insurance Company, Chrysler Financial Corporation, First Assurance Life, and Ford Motor Credit Company; be and hereby are DENIED; IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ford Motor Credit

Company's Motion for Summary Judgment as to plaintiffs' fourth amended complaint be and hereby is DENIED.

New Orleans, Louisiana, this 31st Day of May, 2000.

Lansing L. Mitchell

UNITED STATES SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JOHNNIE L. YOUNG, JR. VERSUS RAY BRANDT DODGE, INC.

CIVIL ACTION NO. 96-1560 c/w 97-0187, 97-2001, 97-2316, 97-2624

SECTION "F"

176 F.R.D. 230; 1997 U.S. Dist. LEXIS 17949; 40 Fed. R.Serv. 3d (Callaghan) 318

November 5, 1997, Decided

November 5, 1997, Filed

DISPOSITION: Plaintiffs' motion to certify class under Rule 23(b)(3) DENIED with prejudice.

COUNSEL: For JOHNNIE L YOUNG, JR, HISAKO YOUNG, plaintiffs (96-CV-1560): John Gregory Odom, Stuart E. DesRoches, Ladson, Odom & DesRoches, New Orleans, LA.

For JOHNNIE L YOUNG, JR, HISAKO YOUNG, plaintiffs (96-CV-1560): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For KERRIE STEWART, plaintiff (97-CV-2624): Joseph Keith Hardie, Jr., J. Keith Hardie, Jr., Attorney at Law, New Orleans, LA.

For KERRIE STEWART, plaintiff (97-CV-2624): John Gregory Odom, Stuart E. DesRoches, Ladson, Odom & DesRoches, New Orleans, LA.

For KERRIE STEWART, plaintiff (97-CV-2624): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For CARRI L ARTRIGUE, plaintiff (97-CV-2316): John Gregory Odom, Stuart E. DesRoches, Ladson, Odom & DesRoches, New Orleans, LA.

For CARRI L ARTRIGUE, plaintiff (97-CV-2316): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For TOMMY PERQUE, JOHNNIE H YOUNG, plaintiffs (97-CV-2001): John Gregory Odom, Stuart E. DesRoches, Ladson, Odom & DesRoches, New Orleans, LA.

For TOMMY PERQUE, JOHNNIE H YOUNG, plaintiffs (97-CV-2001): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For HISAKO YOUNG, JOHNNIE H YOUNG, plaintiffs (97-CV-187): Dawn Adams Wheelahan, Dawn Adams Wheelahan, Attorney at Law, New Orleans, LA.

For RAY BRANDT DODGE INC, defendant (96-CV-1560): Dennis J. Phayer, Alan A. Zaunbrecher, Todd L. Lacoste, Law Office of Alan A. Zaunbrecher, Metairie, LA.

For PROTECTIVE LIFE INSURANCE COMPANY, defendant (97-CV-2624): John M. Wilson, George Denegre, Jr., Cheryl Lea Martin, Liskow & Lewis, New Orleans, LA.

For PROTECTIVE LIFE INSURANCE COMPANY, defendant (97-CV-2624): W. Michael Atchison, Rik S. Tozzi, Starnes & Atchison, Birmingham, AL.

For BANNER OF N O INC, defendant (97-CV-2624): Robert Emmett Kerrigan, Jr., Duris Lee Holmes, Deutsch, Kerrigan & Stiles, New Orleans, LA.

For LAMARQUE FORD INC, defendant (97-CV-2316): Roy M. D'Aquila, DeMartini, LeBlanc, D'Aquila & Volk, Kenner, LA.

For AMERICAN NATIONAL INSURANCE, defendant (97-CV-2316): Charles R. Penot, Jr., Anthony J. Rollo, Jr., McGlinchey, Stafford & Lang, New Orleans, LA.

For AMERICAN NATIONAL INSURANCE, defendant (97-CV-2316): Lance B. Williams, Pulaski, Gieger & Laborde, New Orleans, LA.

For AMERICAN NATIONAL INSURANCE, defendant (97-CV-2316): Scott D. Daniel, Greer, Herz & Adams, Galveston, TX.

For RAY BRANDT NISSAN, INC., RAY BRANDT DODGE INC, defendants (97-CV-2001): Dennis J. Phayer, Alan A. Zaunbrecher, Todd L. Lacoste, Law Office of Alan A. Zaunbrecher, Metairie, LA.

For LOUISIANA DEALER SERVICES INSURANCE, FIRST ASSURANCE LIFE OF AMERICA, defendants (97-CV-2001): H. Alston Johnson, Elizabeth Jane Hastings Sherman, Richard E. Matheny, Darrell James Loup, Margaret Eleanor Kozan, Phelps, Dunbar, LLP, Baton Rouge, LA.

For RAY BRANDT DODGE INC, defendant (97-CV-187): Dennis J. Phayer, Alan A. Zaunbrecher, Law Office of Alan A. Zaunbrecher, Metairie, LA.

For FIRST ASSURANCE LIFE OF AMERICA, LOUISIANA DEALER SERVICES INSURANCE, defendants (97-CV-187): James M. Cutshaw, H. Alston Johnson, Elizabeth Jane Hastings Sherman, Richard E. Matheny, Darrell James Loup, Margaret Eleanor Kozan, Phelps, Dunbar, LLP, Baton Rouge, LA.

JUDGES: MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: MARTIN L. C. FELDMAN

OPINION: ORDER AND REASONS

Before the Court is plaintiffs' Motion for Class Certification under Rule 23(b)(3) of a class composed of:

> persons currently residing in Louisiana who purchased and financed insurance, but not including liability insurance, from defendants, Louisiana Dealer Services Insurance Company, Inc., First Assurance Life of America, American National Insurance Company, and Protective Life Insurance Company, in connection with retail installment contracts which financed the purchase of vehicles from vehicle dealers in Louisiana.

The plaintiffs also seek to certify a subclass compromised of:

> persons, included within the above described class, who purchased insurance described as credit life insurance in connection with retail

installment contracts which financed the purchase of vehicles from vehicle dealers in Louisiana.

Plaintiffs invoke the familiar mantra of RULE 23(b)(3): that common issues predominate, and that one class action is superior to other available methods for resolving this controversy. Because the Court is not persuaded, the motion is DENIED.

I. Background

This motion is the plaintiffs' latest of varying attempts at class certification in these consolidated cases. The plaintiffs seek to certify a class under Rule 23(b)(3) of the Federal Rules of Civil Procedure, asserting fraud-based claims arising out of an alleged conspiracy involving defendants' violation of the federal RICO statute and Louisiana fraud law. They have switched visions of the proposed class models several times to gain Court acceptance.

Previously, the plaintiffs wanted to certify a class under Rule 23(b)(1)(A) (inconsistent adjudications) and Rule 23(b)(1)(B) (limited fund). However, that attempt only included three of these consolidated cases. The Court denied the motion, but without prejudice to seek certification under Rule 23(b)(1)(B) because of prematurity. Certification proceedings based on the limited fund theory in the first three cases were then scheduled for September 24, 1997. Before the hearing date, however, the plaintiffs filed two additional lawsuits which were then consolidated by the Court. Plaintiffs' two new suits tended to produce more heat than light, and the Court

continued the class certification hearing until October 22, 1997, so that the newly-added defendants would have time to respond. Faced with a tactical dilemna, the plaintiffs then tried to sever the newly added defendants, which was denied by the Court. Their vision of the class then changed still again: The plaintiffs now seek certification of a class of plaintiffs only under Rule 23(b)(3).[1]

II. Law and Application

This case, and the effort to squeeze it into a Rule 23 class action is about one simple issue: Have the defendants fraudulently sold to plaintiffs, who financed automobile purchases, insurance in the event of death or disability at inflated premium prices? The issue is a serious one, and the answer may well be yes. It is common to all plaintiffs (or the estate of a plaintiff), but for a variety of other reasons, the answer may also be no. And that is where this Court's resolution of the Rule 23 issues must begin.

---

[1] The Court noted on October 9, 1997, that because the plaintiffs voluntarily waived certification under Rule (b)(1)(B), it would only hear the plaintiffs' motion for certification under Rule 23(b)(3). Therefore, the plaintiffs' motion to certify cases 96-1560, 97-0187, and 97-2001 under Rule 23(b)(1)(B) is denied as moot. The motion to strike expert affidavit, filed by Louisiana Dealer Services and First Assurance Life of America, is also denied as moot. The expert testimony was for class certification under Rule 23(b)(1)(B), which has been withdrawn.

Parties seeking class certification must satisfy all the Rule 23(a) prerequisites and at least one of the requirements of Rule 23(b).[2] Because plaintiffs fail to satisfy the

---

[2] Rule 23. Class Actions

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the

requirements of Rule 23(b)(3), the Court need not decide whether plaintiffs satisfy Rule 23(a).

A. Rule 23(b)(3) Requirements

1. Predominance

This Court ought not and cannot certify a class under Rule 23(b)(3) if individual questions of fact predominate over questions that are common to the class. *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir.), cert. denied, 516 U.S. 867, 133 L. Ed. 2d 122, 116 S. Ct. 184 (1995); *In re Masonite Corp.*, 170 F.R.D. 417 (E.D. La. 1997); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340 (S.D. Ga. 1996), aff'd sub nom, *Jones v. H & R Block Tax Services*, 117 F.3d 1433 (11th Cir. 1997); *See also Ford v. Murphy Oil*, 703 So. 2d 542, 1997 WL 559888 at *6 (La. Sept. 9, 1997). The Fifth Circuit has clearly instructed that when plaintiff conduct individualizes each case, class certification will be inappropriate. *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Buford*, 168 F.R.D. at 355. Here, the issues that predominate are largely discrete and personal. Because the underlying claims are all based on fraud, an introverted reliance as to each aggrieved person, each credit purchaser, must be shown. *See Williams v. WMX Technologies*, 112 F.3d 175, 177 (5th Cir. 1997); *Andrews v. AT & T*, 95 F.3d 1014 (11th Cir. 1996); *Mack v. GMAC*, 169 F.R.D. 671 (M.D. Ala. 1996).[3] The simple doctrine the case

---

difficulties likely to be encountered in the management of a class action.

[3] In *Andrews*, plaintiffs with RICO claims based on common misrepresentations in promotional materials were denied class

literature supports is that fraud cases are counterintuitive to Rule 23(b)(3) even if fraud is common to all cases. "[A] fraud class action" the Fifth Circuit has written, "cannot be certified when individual reliance will be an issue." *Castano*, 84 F.3d at 744 (citing *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973)).

The plaintiffs would disguise a duck as a swan. They urge that this is merely a "form case" and that the Court need only look at the insurance disclosures made on the retail installment contracts that were signed by the plaintiffs. They claim that because of material omissions, proof of reliance is not necessary. The defendants correctly note that this is not just a form case and that individual reliance must necessarily be shown to prove fraud. A host of factors must be considered to prove fraud under RICO and state fraud laws. They are the very structure of the proof of these cases. These factors include: (1) the information actually given to each plaintiff; (2) the sales presentation made to each plaintiff; (3) the retail installment contract and the disclosures made on the forms; (4) whether a plaintiff read the information provided to him; (5) if the plaintiff did not read the information, as is admitted in one case, his understanding of the transaction; (6) representations made to and by the plaintiff; (7) the questions asked by each plaintiff at the time of the sale and the answers provided; (8) the extent to which the

---

certification. The Eleventh Circuit held that individual issues predominated because the plaintiffs would ultimately have to show reliance on misrepresentations. In *Mack*, where plaintiffs asserted RICO and state law fraud claims, the court refused to certify a class because the individual reliance of each plaintiff was an issue.

plaintiff relied on the information given by the defendant; (9) the plaintiff's motivation for purchasing the insurance (which differs as to at least one case); (10) whether the plaintiff would, or could have, bought the policy for a lower price if he had known about the commission paid to the dealers.

The Court agrees with the defendants. It betrays common sense to presume that the plaintiffs were all mute automatons who were told nothing, participated in no financing discussions, had false papers thrust before them, and unthinkingly signed them. Because individual reliance is patently an issue, this is not a case that can be determined by looking simply at the retail installment contracts the plaintiffs signed when they purchased their vehicles. Such skimpy proof would fail. No. Each plaintiff has a different set of personalized circumstances about his decision to purchase insurance. For example, Johnnie Young purchased the credit life insurance because he was worried about his health for specific and disclosed reasons. He had a family history of cancer, and at the time he purchased his van, he was not feeling well and had been passing blood in his stool. He admits that because of his medical condition he probably would still have bought the credit life insurance, even if he knew about the commission. So the issue of whether he was defrauded requires an individual inquiry. Carri Artigue did not purchase credit life insurance. She purchased credit disability insurance. But like Young, she does not object to the cost of the policy; she objects to the undisclosed commissions paid to the dealer. Again, the question of reliance is unqualifiedly subjective to her. Whether Ms. Artigue

relied on information given to her by the dealer in question, or whether she would have purchased the insurance had she known of the commissions are questions specific to her situation. Still more follows: Kerri Stewart, who is acting on behalf of her father's estate, knows nothing of the facts surrounding her father's purchase of insurance. She was not with him when he purchased the insurance, but she claims (through counsel) that both misrepresentations and omissions were made. Once again her father's reliance on the alleged misrepresentations and omissions depends on factors which are specific to his purchase of insurance. Apparently, some people, like Mr. Young, who were concerned about health, would have purchased the insurance regardless of the commission paid to the dealers. On the other hand, others may have decided against purchasing the insurance. Whether the answer is yes or no, that central question can only be resolved on an individual basis.

Each plaintiff clearly has a specific set of circumstances surrounding his or her purchase of the insurance at issue. Questions of reliance cannot rationally be denied to exist, are wholly individual, and demand an inquiry into each specific purchase of insurance to determine if material omissions or misrepresentations were made. In fact, during oral argument, counsel's own presentation often intertwined omissions and misrepresentations.

These individual reliance issues are additionally magnified by the fact that not one of the representative plaintiffs has a claim against more than one of the defendants. Each plaintiff's claim is not only subjective but is specific to each defendant. No overlap or link among the defendants exists. Although plaintiffs are dogmatic about

standardized conduct, what sales representatives told what plaintiffs varies from dealer to dealer. And there are even differences in the types of insurance purchased by the plaintiffs. For instance, Johnnie Young bought credit life and mechanical breakdown insurance, Carri Artigue did not purchase credit life insurance at all (she only bought credit disability and extended warranty insurance).

Although common generalized issues of fraud certainly exist in these cases, like the use of forms and such, the plaintiffs have not established that they predominate. In fact, the issues which do predominate involve an inquiry into the subjective circumstances about each plaintiff's decision to purchase the insurance policies in question. Thus, class certification is not appropriate.

2. Superiority

Although the plaintiffs have not satisfied the predominance requirement of Rule 23(b)(3), it also seems instructive to speak briefly to the second requirement, superiority. This requirement is cousin to the predominance requirement. One flows from the other. Castano speaks thusly: "An incorrect predominance finding also implicates the court's superiority analysis: The greater the number of individual issues, the less likely superiority can be established." *Castano*, 84 F.3d at 745 n.19. When individual questions of fact predominate over common questions, the litigation becomes unmanageable and less efficient than litigation involving smaller classes, or even a series of individual suits. Therefore, class certification of cases in which individual questions predominate

also fails the test of superior adjudication. *Buford*, 168 F.R.D. at 364.

Class treatment is simply not, on this record, superior much less better. Each plaintiff has questions that are specific to his own circumstances in purchasing the insurance in question and those questions are best resolved individually. The Court would also add that when a plaintiff's theory is novel and untested, class certification is not a superior method of adjudication. See *Ford*, No. 96-2913, 1997 WL 559888 at *7. Look again to *Castano*: "Certification of an immature tort brings with it unique problems that may consume more judicial resources than certification will save." *Castano*, 84 F.3d at 734. In this case, the plaintiffs' claims for fraudulent insurance practice in this state have never been adjudicated by any court. Thus, certifying a class under these conditions does not seem to be a superior means of adjudicating these cases. When fraud like that claimed here is so central to the grievance, it must be resolved on a case-by-case basis. It would be unseemly, and offend justice, to lump all claims of fraud together. See *Rhone-Poulenc*, 51 F.3d at 1298.

Conclusion

Because the plaintiffs have failed to demonstrate that common issues predominate and that a class action is a superior method of adjudicating the issues, plaintiffs'

motion to certify a class under Rule 23(b)(3) is DENIED, with prejudice.

New Orleans, Louisiana, November 5, 1997.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31154

MARION DIXON; ET AL

Plaintiffs

MICHELLE JAMES ORSO; LEROY PERRY; KEVIN DUTHU

Plaintiffs-Appellants

v.

FORD MOTOR CREDIT COMPANY; CHRYSLER FINANCIAL CORPORATION; NISSAN MOTOR ACCEPTANCE CORPORATION; LOUISIANA DEALER SERVICES INSURANCE INC; FIRST ASSURANCE LIFE OF AMERICA; AMERICAN NATIONAL INSURANCE COMPANY

Defendants-Appellees

KEVIN WELLS, JR; Etc; ET AL

Plaintiffs

v.

LOUISIANA DEALER SERVICES INC; FIRST ASSURANCE LIFE OF AMERICA; CRESCENT CITY NISSAN EAST

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

---

ON PETITION FOR REHEARING

(Filed May 9, 2001)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARION DIXON, BEVERLY SCHNEIDER LEROY PERRY, MICHELLE JAMES ORSO and KEVIN DUTHU on behalf of themselves and others similarly situated	**CIVIL ACTION**
VERSUS	**NO. 98-2456**
FORD MOTOR CREDIT COMPANY, CHRYSLER FINANCIAL CORPORATION NISSAN MOTOR CREDIT COMPANY LOUISIANA DEALER SERVICES INSURANCE, INC. FIRST ASSURANCE LIFE OF AMERICA AMERICAN NATIONAL INSURANCE COMPANY	**SEC. "J" (2)** **JUDGE BARBIER** **MAG. SHUSHAN**

****

RICO CASE STATEMENT

1. The alleged unlawful conduct is in violation of 18 U.S.C. 1962(c) and (d).

2. Defendants are:

   (a) **Ford Motor Credit Company**, which is liable for misconduct set forth in ¶¶15, 16, 17, and 18 of the Complaint;

   (b) **Chrysler Financial Corporation**, which is liable for misconduct set forth in ¶¶19, 20, 21, 22 and 23 of the Complaint;

(c) **Nissan Motor Credit Company**, which is liable for misconduct set forth in ¶¶24, 25, 26 and 27 of the Complaint;

(d) **Louisiana Dealer Services, Inc.**, which is liable for misconduct set forth in ¶¶28 and 29 of the Complaint;

(e) **First Assurance Life of America**, which is liable for misconduct set forth in ¶¶ 28 and 29 of the Complaint;

(f) **American National Insurance Company**, which is liable for misconduct set forth in ¶¶ 30 and 31 of the Complaint.

3. Information with respect to additional wrongdoers will be provided as it becomes available during the course of discovery in this action.

4. Victims are the representative plaintiffs in this action and each class member. Each has been damaged by paying excessive premiums for insurance mis-identified as credit life insurance; and by paying interest on the excessive premiums; which damages would not have been incurred but for use of the U. S. Mails as anticipated by defendants in paying monthly installments on retail installment contracts.

5. (a) The predicate acts are mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343, set forth in the Complaint at ¶¶ 10, 11, 16, 17, 19, 20, 22, 24, 25, 26, 28, and 30.

(b) The dates of predicate acts and the participants are set forth in ¶¶ 10, 13, 17, 18, 22, 23, 26, 27, 28, and 30 of the Complaint. Additional predicate acts, committed by the same participants, have occurred in each month of every year from 1990 to the present.

(c) The time, place, and content of the alleged omissions are contained in the retail installment contracts of every class member, and/or their insurance policies or applications therefor, which are within the custody and control of the defendants. The omissions to disclose material facts with respect to credit life insurance sold to the plaintiffs and all class members are set forth in the Complaint at ¶¶ 8 and 9. The omissions were made by the defendants, which are corporations that act only through their employees. The omissions were made at the time and place each class member's retail installment contract was confected.

(d) The relationship of the predicate acts to the enterprises is contained in ¶¶12, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 29, and 31 of the Complaint.

6. Descriptions of the alleged enterprises and the conduct complained of for the RICO claims against each defendant are found in the paragraphs of the Complaint under the heading Factual Allegations, and in addition, in ¶¶ 12, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 29, and 31 of the Complaint.

(a) The names of the corporations alleged as enterprises are contained in the Complaint in ¶12.

(b) The roles and course of conduct of the enterprises are contained in ¶¶ 12, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 29, and 31 of the Complaint.

(c) No officers, directors, employees or individuals are named as defendants.

(d) This information is contained in the Complaint, at the paragraphs listed in part (b) of this question, above.

(e) Each defendant is separate from the enterprise with respect to whose affairs the defendant is alleged to have conducted or participated through a pattern of racketeering activity.

(f) No such allegations are made. Each defendants is alleged to have conducted or participated in the affairs of an enterprise separate from the respective defendant.

7. This is contained in ¶ 12 of the Complaint, and in the paragraphs listed in response to the preceding question.

8. The pattern of racketeering activity with respect to the defendants can be found in the Complaint, at ¶¶ 10, 11, 15, 16, 19, 20, 22, 23, 24, 25, 26, 28, 29, and 30. The racketeering activity differs from other usual and daily activities of the enterprises in that the racketeering activity encompasses only activities relating to the mailing of monthly payments for purchases of credit life insurance by means of retail installment contracts, while the enterprises are engaged in activities, presumably lawful, apart from these monthly mailings.

9. Without the use of the U. S. mails for monthly installment payments of retail installment contracts, plaintiffs would not incur damages each month for interest costs on excessive insurance premiums, and defendants could not collect monthly installment payments, the interest for which was improperly insured.

10. Vehicles are instruments of interstatē commerce, manufactured and sold in interstate commerce, and financing by means of retail installment contracts is an interstate financial transaction.

11. Not applicable.

12. Not aplicable.

13. This information can be found in ¶ 12 of the Complaint. With respect to each defendant, the enterprise whose affairs the respective defendant is alleged to have conducted or participated in is separate.

14. This can be found at ¶¶ 13, 17, 18, 22, 23, 26, 27 of the Complaint.

15. Each class member has been damaged by paying excessive premiums for insurance mis-identified as credit life insurance; and by paying interest on the excessive premiums; which damages would not have been incurred but for use of the U. S. Mails as anticipated by defendants in paying monthly installments on retail installment contracts.

16. This is described in the Complaint, at ¶¶4-12, and 15-31.

17. Each monthly payment paid by each class member, by U. S. Mail as anticipated by the defendants, added to each class member's damages.

18. There are no other federal causes of action at this time.

19. Pendent state claims are brought under the Louisiana Motor Vehicle Sales Finance Act, L. A. R. S. 6:951, *et seq.*

20. This will be provided as it becomes available.

Respectfully submitted,

DAWN ADAMS WHEELAHAN,
T.A. (19263)
650 Poydras Street, Suite 1550
New Orleans, Louisiana 70130
Telephone: 504-522-0495
Telecopy: 504-581-1624
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the foregoing has been forwarded to all counsel of record by facsimile transmission this 2nd day of August, 1999.

DAWN ADAMS WHEELAHAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARION DIXON, BEVERLY SCHNEIDER LEROY PERRY, MICHELLE JAMES ORSO and KEVIN DUTHU on behalf of themselves and others similarly situated	CIVIL ACTION
VERSUS	NO. 98-2456
FORD MOTOR CREDIT COMPANY, CHRYSLER FINANCIAL CORPORATION NISSAN MOTOR CREDIT COMPANY LOUISIANA DEALER SERVICES INSURANCE, INC. FIRST ASSURANCE LIFE OF AMERICA AMERICAN NATIONAL INSURANCE COMPANY	SEC. "J" (2) JUDGE BARBIER MAG. SHUSHAN

****

FOURTH AMENDED AND RESTATED CLASS ACTION COMPLAINT

The Complaint of representative plaintiffs, **Leroy Perry** and **Michelle James Orso and Kevin Duthu** respectfully represents as follows:

JURISDICTION AND VENUE

1.

This Honorable Court has jurisdiction in this matter under 28 U.S.C. 1331 (federal question), as plaintiffs bring

their complaint pursuant to the provisions of 18 U.S.C. 1962, *et seq.* (the Racketeer Influenced and Corrupt Organizations Act). [Supplemental jurisdiction pursuant to 28 U.S.C. 1367.] Venue is proper in this District under 28 U.S.C. 1391 because all defendants are subject to personal jurisdiction in the Eastern District of Louisiana, and all defendants are corporations or insurance companies resident or doing business in the State of Louisiana, and because the acts complained of herein occurred in the Eastern District of Louisiana.

PARTIES

2.

Representative plaintiffs, **Michelle James Orso, Leroy Perry, and Kevin Duthu** are all persons of majority domiciled in the Eastern District of Louisiana. Former representative plaintiffs **Marion Dixon** and **Beverly Schneider** are also persons of majority domiciled in the Eastern District of Louisiana.

3.

Defendant, **Ford Motor Credit Company** (Ford Credit), is a corporation organized under the laws of the State of Michigan, which does business throughout the State of Louisiana, including the Eastern District of Louisiana. Defendant, **Chrysler Financial Corporation** (Chrysler Financial), is a corporation organized under the laws of the State of Delaware, which does business throughout the State of Louisiana, including the Eastern

District of Louisiana. **Nissan Motor Acceptance Corporation** (Nissan) is a California corporation which does business throughout the State of Louisiana including the Eastern District of Louisiana. Defendant, **Louisiana Dealer Services Insurance, Inc.** is a Louisiana corporation with its home office in Baton Rouge, Louisiana, which conducts business in the Eastern District of Louisiana. Defendant, **First Assurance Life of American** is a Louisiana insurance company and a wholly-owned subsidiary of Louisiana Dealer Services Insurance, Inc., which conducts business in the Eastern District of Louisiana. Defendant, **American National Insurance Company**, has its home office in Irving, Texas, and delivers policies and conducts business in the Eastern District of Louisiana.

FACTUAL ALLEGATIONS

4.

Plaintiffs, and all proposed class members, are person who purchased credit (financing) from defendants **Ford Credit, Chrysler Financial, or Nissan**, in Louisiana in connection with vehicle financing, or are persons who co-signed obligations on retail installment contracts evidencing such purchases. The credit was used to finance vehicles, and premiums for policies of credit life insurance, purchased from vehicle dealers in Louisiana. The financing is provided by means of retail installment contracts. The form retail installment contracts are provided to the vehicle dealers by one of the defendants, **Ford**

Motor Credit Company (Ford Credit) or **Chrysler Financial Corporation (Chrysler Financial)**, or **Nissan Motor Acceptance Corporation (Nissan)**.

5.

The policies of credit life insurance purchased by plaintiffs, and financed by defendants, **Ford Credit, Chrysler Financial**, or **Nissan**, were underwritten by defendants **First Assurance Life of America (FALA), Louisiana Dealer Services Insurance, Inc. (LDS)**, or **American National Insurance Company (ANICO)** and the coverage was sold according to defendants' ordinary practices and procedures in Louisiana.

6.

The defendants, **Ford Credit, Chrysler Financial**, and **Nissan**, obtained a security interest in the proceeds of the credit insurance policies sold to plaintiffs, and in the unearned premiums, by the terms of the retail installment contracts which financed the purchases. Defendants have profited from collecting excessive insurance premiums, or by collecting interest earned on the financing of the credit insurance premiums, and/or by obtaining additional security, in the form of life insurance, for the retail installment contracts beyond the amount financed by the contracts.

7.

Defendants, **First Assurance Life of America (FALA), Louisiana Dealer Services Insurance, Inc.**

(LDS), and **American National Insurance Company** (ANICO) have profited by receiving premiums for the sale of excessive amounts of credit life insurance coverage to cover unearned interest which would never be owed, over the entire terms of the retail installment contracts in connection with which the insurance coverage was sold, in violation of Louisiana law, and specifically La. R. S. 6:956 F(1) and (2).

8.

The retail installment contracts by which plaintiffs financed their vehicle and credit insurance purchases omit to disclose to plaintiffs and all proposed class members the fact that credit life insurance coverage was sold, and the premium was calculated and financed, to include not only coverage for the funds plaintiffs borrowed, but also for all of the unearned interest over the entire term of their retail installment contracts. At no time would any borrower or insurer owe to any lender unearned interest, under Louisiana law, and also under the terms of the retail installment contracts. Plaintiffs have been damaged by defendants' material omissions, by paying for credit life insurance to insure interest which no borrower or insurer ever bears the risk of paying.

9.

The retail installment contracts by which plaintiffs financed their vehicles and credit insurance purchases omit to disclose accurately the premium paid to the insurance company for the credit life insurance. This material omission conceals an undisclosed commission of more

than 65% of the insurance premium, calculated to include coverage for unearned interest, to the vehicle dealers, who sell insurance on behalf of defendants, **First Assurance Life of America (FALA), Louisiana Dealer Services Insurance, Inc. (LDS),** and/or **American National Insurance Company (ANICO),** and who sell financing for the insurance premiums and vehicles on behalf of defendants, **Ford Credit, Chrysler Financial,** and/or **Nissan**

10.

Defendants each have committed multiple predicate acts of mail and wire fraud, by using the U. S. mails and interstate wire communications in connection with a scheme to defraud plaintiffs, in a continuing pattern of racketeering activity described hereinbelow, by transferring funds and information between themselves and vehicle dealers by means of interstate wire communications in connection with each of thousands of financing transaction, whereby plaintiffs are defrauded; and by using the U. S. mails to transmit and receive documents, and other communications to and from vehicle dealers, which communications are conducted in connection with the above-described scheme to defraud plaintiffs; and by causing the mails to be used to receive payments from plaintiffs throughout the terms of their loans. These acts have been committed by defendants on multiple occasions in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times, and are continuing.

11.

The information transmitted by mails and interstate wires includes records of insurance policies sold, including insurance certificate and/or policy numbers, which are transmitted from vehicle dealers to the defendant insurance companies on a monthly basis, and payment for insurance premiums. Interstate wire communications are used in connection with the complained-of financing transactions to obtain credit reports, which are transmitted to the defendant lenders, who then communicate back to vehicle dealers their approval of the financing arrangements, or alternate financing arrangements.

12.

Defendants have violated the provisions 18 U.S.C. 1962(c) by conducting or participating, directly or indirectly, in the conduct of the affairs of enterprises, through a pattern of racketeering activity. The enterprises include (a) LaMarque Ford, Inc., with which defendants **Ford Credit** and **American National Insurance Company,** are associated by contractual relationships; (b) Julian Graham Dodge, Inc., with which defendants **Chrysler Financial, Louisiana Dealer Services Insurance, Inc.,** and **First Assurance Life of America** are associated by contractual relationships; (c) Ray Brandt Dodge, Inc., with which defendants **Chrysler Financial, Louisiana Dealer Services Insurance, Inc.,** and **First Assurance Life of America** are associated by contractual relationships; and (d) Ray Brandt Nissan, Inc., with which defendants **Nissan, Louisiana Dealer Services Insurance, Inc.,** and **First**

Assurance Life of America are associated by contractual relationships.

13.

Defendants have violated the provisions of 18 U.S.C. 1962(d) by conspiring to violate the provisions of 18 U.S.C. 1962(c), as described herein. Defendants' agreements to commit the acts complained-of have occurred at the time they enter into contractual relationships with one another, and occur again in connection with each sale of credit insurance and financing transaction, by which the representative plaintiffs and all class members have been damaged. These acts have occurred on multiple occasions in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times, and are continuing.

14.

Defendants have violated the provisions of LSA-R.S. 6:956 F(1), (2), and (6) by selling excessive and unlawful amounts of credit insurance, and by failing accurately to disclose on plaintiffs' retail installment contracts the amount and kind of insurance sold in connection therewith. In all instances in which credit insurance has been sold to plaintiffs, coverage has been sold for the total-of-payments, including unearned interest, rather than for the original amount due under the retail installment contract (which includes service charges and non-refundable finance charges owed at the origin of the contract, but not unearned interest).

RICO ALLEGATIONS

15.

Defendant, **Ford Credit** has violated the provisions of 18 U.S.C. 1962 (c), *et seq.* by associating with LaMarque Ford, Inc. and participating, directly or indirectly in the conduct of the affairs of LaMarque Ford, Inc. through a pattern of racketeering activity comprised of multiple continuing acts of mail and wire fraud. Specifically, **Ford Credit** participates in the conduct of the affairs of LaMarque Ford, Inc. by agreeing to finance and by financing the complained-of insurance premiums, which would not be sold but for the financing arrangements undertaken by **Ford Credit** with LaMarque Ford, Inc. **Ford Credit** establishes the terms upon which the retail installment contracts and financing agreements shall be accepted by **Ford Credit**, and thus, sold by LaMarque Ford, Inc.

16.

Ford Credit causes interstate wire communications to be used to obtain credit reports incidental to **Ford Credit's** financing of excessive credit life insurance policies, causes interstate wire communications to be used to transmit information with respect to such credit reports to and from LaMarque Ford and **Ford Credit.**. **Ford Credit** participates in the conduct of the affairs of LaMarque Ford by accepting the assignment of retail installment contracts from LaMarque Ford. **Ford Credit** further participates in the conduct of the affairs of LaMarque Ford by providing forms to LaMarque Ford by which are transmitted using the U.S. mail. This participation by **Ford Credit** in the conduct of the affairs of LaMarque

Ford facilitates LaMarque Ford's business of selling improper and excessive credit insurance in connection with the sale of vehicles, without which plaintiffs would not be damaged. Plaintiffs are damaged by paying excessive premiums and interest for excessive credit insurance financed by **Ford Credit**, which would not be sold but for the financing, and which would not be paid for in monthly installments but for the use of the U.S. mails.

17.

Ford Credit and LaMarque Ford further agree that LaMarque shall assign retail installment contracts to **Ford Credit**, thereby causing the mails to be used by borrowers to transmit monthly payments to **Ford Credit** over the terms of the loans. These acts occurred in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

18.

Defendant, **Ford Credit** has violated the provisions of 18 U.S.C. 1962(d) by agreeing with LaMarque Ford, Inc. to violate the provisions of 18 U.S.C. 1962 (c) as described herein. These agreements occurred on multiple occasions in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

19.

Defendant, **Chrysler Financial** has violated the provisions of 18 U.S.C. 1962 (c), *et seq.* by associating with

Ray Brandt Dodge, Inc., and separately with Julian Graham Dodge, Inc. and participating, directly or indirectly in the conduct of the affairs of Ray Brandt Dodge, Inc., and Julian Graham Dodge, Inc. through a pattern of racketeering activity comprised of multiple continuing acts of mail and wire fraud. Specifically, **Chrysler Financial** participates in the conduct of the affairs of Ray Brandt Dodge, Inc., and Julian Graham Dodge, Inc. by agreeing to finance and by financing the complained-of insurance premiums, which would not be sold but for the financing arrangements undertaken by **Chrysler Financial** with Ray Brandt Dodge, Inc., and separately with Julian Graham Dodge, Inc. **Chrysler Financial** establishes the terms upon which the retail installment contracts and financing agreements shall be accepted by **Chrysler Financial**, and thus, sold by Ray Brandt Dodge, Inc., and Julian Graham Dodge, Inc.

20.

Chrysler Financial causes interstate wire communications to be used to obtain credit reports incidental to **Chrysler Financial's** financing of excessive credit life insurance policies, causes interstate wire communications to be used to transmit information with respect to such credit reports to and from Ray Brandt Dodge, Inc., and to and from Julian Graham Dodge, Inc., in communicating with **Chrysler Financial**. **Chrysler Financial** participates in the conduct of the affairs of Ray Brandt Dodge, Inc., and separately, Julian Graham Dodge, Inc., by accepting the assignment of retail installment contracts from Ray Brandt Dodge, Inc., and Julian Graham Dodge, Inc. **Chrysler Financial** further participates in the conduct of

the affairs of Ray Brandt Dodge, Inc., and Julian Graham Dodge, Inc. by providing forms to Ray Brandt Dodge, Inc., and to Julian Graham Dodge, Inc., which are transmitted using the U.S. mail. This participation by **Chrysler Financial** in the conduct of the affairs of Ray Brandt Dodge, Inc., and Julian Graham Dodge, Inc., facilitates their business of selling improper and excessive credit insurance in connection with the sale of vehicles, without which plaintiffs would not be damaged.

21.

Plaintiffs are damaged by paying excessive premiums and interest for excessive credit insurance financed by **Chrysler Financial**, which would not be sold but for the financing, and which would not be paid for in monthly installments but for the use of the U.S. mails.

22.

Chrysler Financial and Ray Brandt Dodge, Inc., and **Chrysler Financial** and Julian Graham Dodge, Inc., further agree that Ray Brandt Dodge, Inc., and Julian Graham Dodge, Inc. shall assign retail installment contracts to **Chrysler Financial** thereby causing the mails to be used by borrowers to transmit monthly payments to **Chrysler Financial** over the terms of the loans. These acts occurred in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

23.

Defendant, **Chrysler Financial** has violated the provisions of 18 U.S.C. 1962(d) by agreeing with Ray Brandt Dodge, Inc., and separately with Julian Graham Dodge, Inc., to violate the provisions of 18 U.S.C. 1962 (c) as described herein. These agreements occurred on multiple occasions in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

24.

Defendant, **Nissan** has violated the provisions of 18 U.S.C. 1962 (c), *et seq.* by associating with Ray Brandt Nissan, Inc. and participating, directly or indirectly in the conduct of the affairs of Ray Brandt Nissan, Inc. through a pattern of racketeering activity comprised of multiple continuing acts of mail and wire fraud. Specifically, **Nissan** participates in the conduct of the affairs of Ray Brandt Nissan, Inc. by agreeing to finance and by financing the complained-of insurance premiums, which would not be sold but for the financing arrangements undertaken by **Nissan** with Ray Brandt Nissan, Inc. **Nissan** establishes the terms upon which the retail installment contracts and financing agreements shall be accepted by **Nissan**, and thus, sold by Ray Brandt Nissan, Inc.

25.

Nissan causes interstate wire communications to be used to obtain credit reports incidental to **Nissan's** financing of excessive credit life insurance policies,

causes interstate wire communications to be used to transmit information with respect to such credit reports to and from Ray Brandt Nissan and **Nissan**. **Nissan** participates in the conduct of the affairs of Ray Brandt Nissan by accepting the assignment of retail installment contracts from Ray Brandt Nissan. **Nissan** further participates in the conduct of the affairs of Ray Brandt Nissan by providing forms to Ray Brandt Nissan which are transmitted using the U.S. mail. This participation by **Nissan** in the conduct of the affairs of Ray Brandt Nissan facilitates Ray Brandt Nissan's business of selling improper and excessive credit insurance in connection with the sale of vehicles, without which plaintiffs would not be damaged. Plaintiffs are damaged by paying excessive premiums and interest for excessive credit insurance financed by **Nissan**, which would not be sold but for the financing, and which would not be paid for in monthly installments but for the use of the U.S. mails.

26.

Nissan and Ray Brandt Nissan further agree that Ray Brandt Nissan shall assign retail installment contracts to **Nissan**, thereby causing the mails to be used by borrowers to transmit monthly payments to **Nissan** over the terms of the loans. These acts occurred in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

27.

Defendant, **Nissan** has violated the provisions of 18 U.S.C. 1962(d) by agreeing with Ray Brandt Nissan, Inc.

to violate the provisions of 18 U.S.C. 1962 (c) as described herein. These agreements occurred on multiple occasions in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

28.

Defendants, **Louisiana Dealer Services Insurance, Inc.** and **First Assurance Life of America** have violated the provisions of 18 U.S.C. 1962(c) by using the U.S. mails to transmit certificate of insurance forms to vehicle dealers, including Ray Brandt Dodge, Inc., Ray Brandt Nissan, Inc., and Julian Graham Dodge, Inc., as well as approximately one hundred others, for the sale of credit life insurance in connection with the above-described scheme to defraud plaintiffs. Defendants, **Louisiana Dealer Services Insurance, Inc.** and **First Assurance Life of America** also use the mails, and cause the mails to be used, to transmit monthly reports from vehicle dealers to defendants listing the certificates of insurance or policy numbers evidencing the sales of credit life insurance to plaintiffs. These acts have occurred in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

29.

Defendants, **Louisiana Dealer Services Insurance, Inc.** and **First Assurance Life of America,** participate, directly or indirectly in the conduct of the affairs of Ray Brandt Dodge, Inc., Ray Brandt Nissan, Inc., and Julian

Graham Dodge, Inc., with which defendants are associated by contractual relationships, by means of a pattern of racketeering activity comprised of continuing acts of mail fraud, as described in the preceding paragraph, and by training their employees in the sale of credit insurance in excessive amounts; and by instructing their employees that credit life insurance coverage shall only be sold for the total-of-payments of retail installment contracts rather than the original amounts due; and by providing software to calculate credit life insurance coverage on the total-of-payments of retail installment contracts. Plaintiffs have been damaged by this conduct as described herein.

30.

Defendant, **American National Insurance Company (ANICO)** violates the provisions of 18 U.S.C. 1962(c) by using the U.S. mails to transmit certificate of insurance forms to vehicle dealers, including LaMarque Ford, Inc., and Banner Chevrolet, as well as others, for the sale of credit life insurance in connection with the above-described scheme to defraud plaintiffs. Defendant, **ANICO** also uses the mails, and cause the mails to be used, to transmit monthly reports from vehicle dealers to **ANICO** listing the certificates of insurance or policy numbers evidencing the sales of credit life insurance to plaintiffs. These acts have occurred in February, 1997, March, 1997, June, 1998, July, 1998, and on multiple occasions in each month before and after those times.

31.

Defendant, (**ANICO**), participates, directly or indirectly in the conduct of the affairs of LaMarque Ford, Inc., with which **ANICO** is associated by contractual relationships, by a pattern of racketeering activity including continuing acts of mail fraud; and by training LaMarque's employees in the sale of credit insurance in excessive amounts; and by instructing LaMarque's employees that credit life insurance coverage shall only be sold for the total-of-payments of retail installment contracts rather than the original amounts due; and by providing software to calculate credit life insurance coverage on the total-of-payments of retail installment contracts. Plaintiffs have been damaged by this conduct as described herein.

Fed. R. Civ. P. 23 Class Allegations

32.

Representative plaintiffs bring this action on behalf of themselves, and other similarly situated borrowers, and their secondary obligors, who paid or incurred obligations to pay retail installment contracts which included premiums for credit life insurance which insured unearned interest, in connection with vehicles sold and financed in Louisiana.

33.

All proposed class members seek relief under the same legal and remedial theories, pursuant to the facts and law described hereinabove, so that the claims of the

representative plaintiffs are typical of the claims of all class members.

34.

The questions of law and fact set forth above are common to all class members. The proposed class numbers more than one thousand persons, widely dispersed, so that joinder is impractical.

35.

The representative plaintiffs have no conflict which would prevent their adequate representation of all class members. Proposed class counsel is experienced in class action matters, currently serving as lead counsel in nationwide consumer class actions, and having served as lead counsel in more than fifteen class action or putative class action matters in the Eastern District of Louisiana. Class counsel has no conflicts which would prevent her adequate representation of all class members.

36.

This action should be maintained as a class action pursuant to **Fed. R. Civ. Proc. 23(b)(2)**, because plaintiffs seek declaratory relief, and injunctive relief prohibiting defendants from continuing to finance credit life insurance premiums, and to take a security interest in the policy proceeds and unearned premiums, for coverage of unearned interest, and prohibiting the RICO violations alleged herein. The monetary relief which plaintiffs seek is incidental to the equitable relief sought, in that liability

under equitable theories advanced will automatically entitle plaintiffs to monetary relief, in the form of statutory damages, costs, and attorneys' fees.

37.

Alternatively, this action should be maintained as a class action pursuant to Fed. R. Civ. Proc. 23(b)(3), because common issues, as described hereinabove, predominate over any individual ones, and because class action is superior to other methods available for resolution of this controversy. Common issues, which predominate, are among the following, non-exclusive particulars:

1) whether defendants use the U.S. mail and interstate wire communications, in a pattern of racketeering activity, in connection with a scheme to defraud in connection with financing excessive credit life insurance coverage for vehicle financing contracts;

2) whether defendants have conducted the affairs of an enterprise through a pattern of racketeering activity;

3) whether defendants have conspired to violate the provisions of 18 U.S.C. 1962 (a), (b), and/or (c);

4) whether defendants have violated the provisions of La. R. S. 6:956 F(1), (2), and/or (6).

38.

Class action is superior to other methods available for resolving this controversy, because repetitive litigation of identical issues as presented here would waste the

resources of the courts and the parties; the individual stakes are small when with the costs of the litigation; the class members are widely dispersed, and individual actions to protect their interests would be costly; and a single class action is superior to the repeated production and evaluation of identical evidence which would attend individual litigation of thousands of claims.

WHEREFORE, representative plaintiffs, on behalf of themselves and others similarly situated, respectfully pray for judgment against defendants, **Ford Motor Credit Company, Chrysler Financial Corporation, Nissan Motor Acceptance Corporation, American National Insurance Company, Louisiana Dealer Services Insurance, Inc.** and **First Assurance Life of America,** (including declaratory relief under 28 U.S.C. 2201, and injunctive relief, statutory damages, treble damages and penalties, under federal law and state law, disgorgement of profits earned by unlawfully collected premiums and interest thereon, attorney's fees, all costs of this action, and prejudgment interest. Plaintiffs further pray that they and their counsel be appointed to represent the class.

Respectfully submitted:

DAWN ADAMS WHEELAHAN, T.A. (19263)
650 Poydras Street, Suite 1550
New Orleans, Louisiana 70130
Telephone: 504-522-0495
Telecopy: 504-581-1624
Attorney for Plaintiffs

(2)

No. 01-0215

Supreme Court, U.S.
FILED
SEP 4 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARION DIXON, *ET AL;*

Petitioners,

v.

FORD MOTOR CREDIT, *ET AL;*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FILED BY RESPONDENTS AMERICAN NATIONAL INSURANCE COMPANY, CHRYSLER FINANCIAL CORPORATION, AND NISSAN MOTOR ACCEPTANCE CORPORATION

ANTHONY ROLLO
Counsel of Record
DAVID S. WILLENZIK
MICHAEL H. RUBIN
McGLINCHEY STAFFORD LANG
A PROFESSIONAL LIMITED LIABILITY COMPANY
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Respondents American National Insurance Company, Chrysler Financial Corporation, and Nissan Motor Acceptance Corporation

SCOTT D. DANIEL
GREER, HERZ & ADAMS, LLP
One Moody Plaza
18th Floor
Galveston, TX 77550-7998
(409) 765-5525
Attorney for Respondent American National Insurance Company

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether there is any circuit conflict that civil RICO plaintiffs must plead and prove detrimental reliance upon the alleged mail or wire fraud in order to establish proximate causation between the purported RICO violation and their injuries.

II. Whether other issues presented by Petitioners are properly before the Court, given Petitioners' failure to raise them below and their irrelevance to the decisions of the courts below.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The Petitioners have listed all parties in this proceeding. The Respondents provide their Rule 29.6 corporate disclosure statement below.

American National Insurance Company ("ANICO") is a publicly traded corporation. There is no parent company or publicly held company owning ten percent (10%) or more of ANICO's stock. Two charitable trusts, the Libbie Shearn Moody Trust and the Moody Foundation, each own more than ten percent (10%) of ANICO's stock.

Chrysler Financial Corporation, now known as Chrysler Financial Company, L.L.C., is a wholly owned subsidiary of DaimlerChrysler Corporation, which is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, which is a wholly owned subsidiary of DaimlerChrysler AG. Of these entities, only DaimlerChrysler AG is a publicly held company.

Nissan Motor Acceptance Corporation is a wholly owned subsidiary of Nissan North America, Inc., which is a wholly owned subsidiary of Nissan Motor Co., Ltd. Renault, S.A. owns 36.8% of the common shares of Nissan Motor Co., Ltd., and is a publicly traded corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

REASONS THE PETITION SHOULD BE DENIED .. 6

I. There Is No Conflict Among the Circuits: Every Circuit Court That Has Addressed the Issue Has Held that Civil RICO Plaintiffs Must Plead and Prove Detrimental Reliance Upon the Alleged Mail or Wire Fraud in Order to Establish Proximate Causation between the RICO Violation and Their Injuries 6

A. As an Unpublished, Per Curiam Opinion with No Precedential Value, the Fifth Circuit's Decision in this Case Cannot Create a Conflict Among the Circuits 8

B. There Is No Conflict Among the Circuits.. 9

1. The Second Circuit Requires Reliance.. 9

2. The Third Circuit Requires Reliance.... 11

3. The Fourth Circuit Requires Reliance... 12

4. The Eighth Circuit Requires Reliance... 13

5. The Ninth Circuit Requires Reliance. .. 15

TABLE OF CONTENTS – Continued

Page

6. The Eleventh Circuit Requires Reliance... 16

7. The District of Columbia is Not in Conflict with the Fifth Circuit..... 17

II. Petitioners' Argument Concerning the Fifth Circuit's "Ordinary Prudence Standard for Scheme to Defraud" Does Not Present a Meaningful Conflict Among Circuit Courts..... 18

A. Petitioners' Argument Concerning the "Ordinary Prudence Standard for Scheme to Defraud" Was Not Raised Below..... 18

B. Petitioners' Argument Concerning the Fifth Circuit's "Ordinary Prudence Standard for Scheme to Defraud" Is Irrelevant..... 20

1. The "Ordinary Prudence Standard for Scheme to Defraud" Was Not Mentioned by the Lower Courts in this Case..... 21

2. More Is Required for Civil RICO Liability..... 22

3. The Distinction between an Objective Standard and Other Standards is Irrelevant..... 25

III. Certiorari Should Be Denied in this Case Because It Was Correctly Decided and Does Not Warrant the Court's Review..... 28

CONCLUSION..... 29

TABLE OF AUTHORITIES

Page

CASES

Abraham v. Young & Rubicam, Inc., 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S. 816 (1996) 11

All Care Nursing Serv. v. High Tech Staffing, 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999) 16

Appletree Square I, Ltd. Partnership v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) 13, 14

Atlas Pile Driving Co. v. DiCon Finan. Co., 886 F.2d 986 (8th Cir. 1989) 14

BCCI Holdings (Luxembourg), S.A. v. Khalil, 214 F.3d 168 (D.C. 2000) 17

Bieter Co. v. Blomquist, 987 F.2d 1319 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993) 14

Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) 12, 13

Cement and Concrete Workers District Council Welfare Fund v. Lollo, 148 F.3d 194 (2d Cir. 1998) 10

Central Distribs., Inc. v. Connecticut, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) 7

Chisholm v. Transouth Finan. Corp., 95 F.3d 331 (4th Cir. 1996) 12, 13

Chisholm v. Transouth Finan. Corp., No. 97-1970, 1998 WL 709311 (4th Cir. Oct. 5, 1998) 13

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) 9, 17

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994) 17

TABLE OF AUTHORITIES – Continued

Page

Dothard v. Rawlinson, 433 U.S. 321 (1977) 20

Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052 (3d Cir. 1988) 12

Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir. 1997) 15

Gee v. Boyd, 471 U.S. 1058 (1985) 27

Glover v. United States, 531 U.S. 198 (2001) 19

Greber v. United States, 474 U.S. 988 (1985) 27

Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737 (3d Cir. 1996) 11

John C. Holland Enterprises, Inc. v. J.P. Mascaro & Sons, Inc., 653 F.Supp. 1242 (E.D. Va.), *aff'd*, 829 F.2d 1120 (4th Cir. 1987) 13

Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998) 16

Kenty v. Bank One, 92 F.3d 384 (6th Cir. 1996) 7

Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000) 11, 15

Metromedia Co. v. Fugazy, 983 F.2d 350 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993) 9

MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986) 15

Mid-Atlantic Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260 (4th Cir. 1994), *cert. denied*, 513 U.S. 931 (1994) 13

TABLE OF AUTHORITIES – Continued

Page

National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 20

Newton v. Tyson Foods, Inc., 207 F.3d 444 (8th Cir. 2000) 14

Oregon Laborers-Employers Health and Welfare Fund v. Philip Morris, Inc., 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000) 15

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991) 16, 17, 23, 24

Reynolds v. East Dyer Development Co., 882 F.2d 1249 (7th Cir. 1989) 7

River Road Alliance v. Corps of Eng'rs of the United States, 475 U.S. 1055 (1986) 26, 27

Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256 (2d Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996) 9

Silverman v. United States, 213 F.2d 405 (5th Cir. 1954), *cert. denied*, 348 U.S. 828 (1954) 21, 22

Sommerville v. United States, 376 U.S. 909 (1964) 26

Standardbred Owners Ass'n v. Roosevelt Raceway Assocs. L.P., 985 F.2d 102 (2d Cir. 1993) 10

Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999), *cert. denied, mot. granted*, 528 U.S. 1105 (2000) 11

Summit v. Hoechst Celanese Corp., 214 F.3d 556 (5th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 896 (2001) ..... *passim*

Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991), 967 F.2d 1483 (en banc) (11th Cir.), *cert. denied*, 506 U.S. 1021 (1992) 17

TABLE OF AUTHORITIES – Continued

Page

United HealthCare Corp. v. American Trade Ins. Co., 88 F.3d 563 (8th Cir. 1996) 14

United States v. Biesiadecki, 933 F.2d 539 (7th Cir. 1991) 21, 22

United States v. Coffman, 94 F.3d 330 (7th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997) 21

United States v. Ortiz, 422 U.S. 891 (1975) 20

United States v. Valdez, 594 F.2d 725 (9th Cir. 1979) 27

STATUTES

Federal Rule of Civil Procedure 12 5

Louisiana Motor Vehicle Sales Finance Act, prior La. R.S. 6:951, and present La. R.S. 6:969.1 1

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 1

OTHER AUTHORITIES

Robert L. Stern, et al., *Supreme Court Practice*, § 4.4, at 173 (7th ed. 1993) 26

COUNTERSTATEMENT OF THE CASE

The two consolidated cases at issue here – *Dixon* and *Wells* – are putative class actions filed by Petitioners on behalf of purchasers of credit life insurance bought in connection with automobile purchases. The suits are directed against credit life insurers, finance companies who purchased the Petitioners' retail installment contracts, and an automobile dealer. Petitioners allege they were misled during negotiations with the automobile dealers and that they sustained damages due to their subsequent payment of supposedly excessive insurance premiums and interest. Defendants are cast as co-conspirators in various alleged "enterprises" engaged in mail and wire fraud, all purportedly in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"), and the Louisiana Motor Vehicle Sales Finance Act, prior La. R.S. 6:951, et seq., and present La. R.S. 6:969.1, et seq. (the "LMVSFA").

On July 19, 2000, the district court held a hearing in the consolidated cases to address a Motion to Disqualify Dawn Adams Wheelahan as Class Counsel and for Sanctions. App. at 19. During the hearing, the district court questioned whether Petitioners stated a viable RICO claim – the only federal claim before the court – and ordered briefs on that jurisdictional issue. *Id.* The briefs submitted included deposition testimony from the Petitioners.

The district court then applied the Fifth Circuit's decision in *Summit v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 896 (2001), and on September 11, 2000, dismissed the RICO

claims with prejudice, due to Petitioners' inability to state RICO claims as a matter of law. App. at 31, 34-35. The district court dismissed the LMVSFA claims, without prejudice, after finding that the exercise of supplemental jurisdiction over those state law claims was inappropriate. App. at 32-34. The Fifth Circuit affirmed. App. at 11.

This is a garden variety state law dispute that Petitioners seek to transform into a federal racketeering case. Congress surely did not intend such an expansion of federal jurisdiction when it enacted RICO. With the dismissal of the RICO claims, issues of Louisiana law may properly be resolved by Louisiana state courts. The Fifth Circuit prudently declined to "federalize" state law in this fashion. So should this Court.

The question presented for review is a narrow one. Petitioners seek review of an order issued by the District Court for the Eastern District of Louisiana, affirmed by the Fifth Circuit, in which the trial court held that Petitioners failed to state a claim under RICO:

> In sum, under *Holmes* and *Zervas*, a plaintiff must show proximate cause to recover under RICO on a claim predicated on mail fraud. To show proximate cause in such a case, plaintiffs must demonstrate reliance on defendants' mail fraud. Plaintiffs herein have conceded they did not rely on defendants' mail fraud, and in fact, did not rely on any representations or omissions made by defendants in purchasing credit life insurance. Accordingly, plaintiffs cannot state a claim under 18 U.S.C. § 1962(c).

App. at 31 (citations omitted). Therefore, the only question for this Court to review is whether there is a conflict between the circuits based on the Fifth Circuit's requirement that these Petitioners plead and prove detrimental reliance upon the alleged mail or wire fraud in order to establish proximate causation between the alleged RICO violation and their RICO injuries. The standard for testing a plaintiff's prudence in a scheme to defraud is not an issue before the Court on this Petition.

Petitioners inaccurately characterize the holdings of the various circuit courts when they assert that civil RICO plaintiffs, in a claim based upon the predicate acts of mail and/or wire fraud, need not plead and prove that they detrimentally relied upon the alleged mail or wire fraud. Petition at 6. Because there is no conflict among the circuits on this issue, Petitioners' suggestion that this Petition presents the Court with a conflict among the circuits is erroneous.

Petitioners' analysis of the LMVSFA is misplaced, as: (1) neither the district court nor the Fifth Circuit ruled on the merits of Petitioners' LMVSFA claims; and (2) Petitioners have sought only review of the dismissal of their RICO claims. Accordingly, Petitioners' statements regarding the LMVSFA should be ignored. The bulk of Petitioners' remaining assertions are relevant only to the merits of this case and thus require no response, for the merits were not addressed in the courts below.

STATEMENT OF FACTS

Each of the Petitioner-purchasers asserts that at the time he purchased his vehicle from the automobile dealer, he also purchased credit life insurance from the same dealer who made the credit installment sale of the vehicle. The purchases of the credit life insurance and the vehicles were financed by the defendant finance companies, who purchased retail installment contracts previously entered into between the purchasers and the dealers. The following chart shows the relationship of the Petitioners and the Defendants:

Petitioner	Financing By	Credit Life Provided By
Leroy Perry	Ford Credit[1]	ANICO[2]
Kevin Duthu	NMAC[3]	FALA[4]
Michelle James Orso	CFC[5]	FALA
Kevin Wells	n/a[6]	LDS[7] and FALA

The Petitioner-purchasers claim that at the time of their financed purchases, they were fraudulently induced by the automobile dealers to buy credit life insurance in

---

[1] Ford Motor Credit Company

[2] American National Insurance Company

[3] Nissan Motor Acceptance Company

[4] First Assurance Life of America

[5] Chrysler Financial Corporation

[6] Wells, the named plaintiff in the consolidated matter, C.A. No. 99-CV-1819-J, did not sue the creditor who financed his purchases from Crescent City Nissan East.

[7] Louisiana Dealer Services, Inc.

coverage amounts which were excessive. Although Petitioner-purchasers do not dispute that the full premium for the credit life insurance was disclosed to them prior to their purchases, they contend that they were not told that a portion of the premium would be paid by the insurers to the vehicle dealers as commissions. NMAC, Ford Credit, and CFC are alleged to have participated in the acts of the vehicle dealers who sold credit life insurance to Petitioners on behalf of ANICO and LDS/FALA by providing financing and the forms for retail installment contracts and by subsequently accepting Petitioners' monthly installment payments by mail. Petitioners contend that under these alleged facts the Defendants are liable to Petitioners for unquantified damages equal to the amounts paid by Petitioners for purportedly excessive insurance premiums and interest. The alleged basis of the Defendants' liability is RICO § 1962(c) and state law claims under the LMVSFA.

In their statement of the case, Petitioners make a host of irrelevant factual allegations that are unsupported by the record.[8] Even assuming, for purposes of Fed.R.Civ.P. 12, that the allegations in the various complaints must be taken as true at this point in the proceeding, not a single

---

[8] Petitioners' factual allegations relate to the merits of this case, which are not before the Court on the Petition for Certiorari. Respondents do not waive their objections to Petitioners' misstatements of the case (*e.g.*, Petitioners' characterizations of the nature of credit life insurance, the scope and description of the insured risk, the nature of the credit life policies, the adequacy of disclosures, the descriptions of the insurance terms and risks covered, the existence of any omissions, and the complexity of the documents).

allegation or any combination of them provides the necessary support for a RICO claim. The claims relate solely to state-regulated credit life insurance.

REASONS THE PETITION SHOULD BE DENIED

I. There Is No Conflict Among the Circuits: Every Circuit Court That Has Addressed the Issue Has Held that Civil RICO Plaintiffs Must Plead and Prove Detrimental Reliance Upon the Alleged Mail or Wire Fraud in Order to Establish Proximate Causation between the RICO Violation and Their Injuries.

The Fifth Circuit's *Dixon* decision does not conflict with any decision of this Court or of any circuit court on the same matter. To the contrary, every circuit court that has addressed the issue has held that plaintiffs must show detrimental reliance in civil RICO actions predicated on mail or wire fraud.

Petitioners misread the circuits' holdings in an attempt to manufacture a conflict among the circuits. Petitioners erroneously claim that, in civil RICO cases based on mail or wire fraud predicate acts, the Fifth Circuit's "universal" reliance requirement to establish proximate cause conflicts with cases from the Second, Third, Fourth, Eighth, Ninth, Eleventh and District of Columbia Circuits, although Petitioners do properly

concede that the Sixth and Seventh Circuit opinions are consistent with those of the Fifth Circuit.[9] Petition at 9-10.

This Petition is the second recent attempt to claim that the Fifth Circuit's holdings on civil RICO reliance conflict with other circuits. On January 22, 2001, the Court properly denied certiorari on this precise issue in *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 896 (2001). The *Dixon* decision, in which the Fifth Circuit closely followed *Summit*, is an unpublished, per curiam decision without precedential value, and warrants a grant of certiorari even less than did *Summit*.

This Petition is simply a reworking of the *Summit* certiorari petition. The *Summit* petition railed against the Fifth Circuit's "blanket" reliance requirement; this phrase in the current Petition now appears as a harangue against a "universal" reliance requirement.[10] The Court should

---

[9] *See Central Distribs., Inc. v. Connecticut*, 5 F.3d 181, 184 (6th Cir. 1993) (affirming the dismissal of civil RICO mail and wire fraud claims because plaintiff could not show reliance on any misrepresentations), *cert. denied*, 512 U.S. 1207 (1994); *Kenty v. Bank One*, 92 F.3d 384, 390-91 (6th Cir. 1996) (the court affirmed the dismissal of civil RICO claims predicated on mail fraud because the plaintiffs could not present evidence that they relied on misrepresentations); *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1254 (7th Cir. 1989) (affirming the dismissal of civil RICO claims predicated on mail or wire fraud because plaintiffs could not present evidence that they relied on misrepresentations by the defendants).

[10] *See* Petition at 9-10 n.16. A comparison of the petition from *Summit* with the Petition in this case shows that wholesale sections from the *Summit* petition are transferred verbatim to this petition or are slightly reworded and moved around.

deny this Petition, as it did in *Summit*, for, as demonstrated in Section B below, there is simply not any inter-circuit conflict on the civil RICO reliance issue.[11]

A. As an Unpublished, Per Curiam Opinion with No Precedential Value, the Fifth Circuit's Decision in this Case Cannot Create a Conflict Among the Circuits.

The Fifth Circuit issued its decision in this case as an unpublished, per curiam opinion. App. at 2. Since 1996, unpublished opinions are not precedential in the Fifth Circuit, pursuant to Local Rule 47.5.4, which provides in pertinent part:

> Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).

5th Cir. R. 47.5.4.

Obviously, an opinion that has no precedential value cannot create a conflict among the circuits. The Petition should be denied, because the Fifth Circuit's opinion has

---

Compare "universal" test substituted for "blanket" test, *Summit* Petition at 9, 10, 11, 12, 14, 17, 22; *Dixon* Petition at 3, 6, 9, 11, 18, 22, 29.

[11] In fact, Respondents were not even able to find caselaw evidencing an *intra*-circuit conflict on the issue of requiring civil RICO plaintiffs to demonstrate their reliance on mail or wire fraud.

no impact on future decisions of any circuit, including the Fifth Circuit.

B. There Is No Conflict Among the Circuits.

The Petitioners' assertion that the rulings of the Fifth Circuit on civil RICO detrimental reliance conflict with the holdings of the Second, Third, Fourth, Eighth, Ninth, Eleventh and District of Columbia Circuits simply cannot withstand scrutiny. No circuit conflict exists.

1. The Second Circuit Requires Reliance.

The Second Circuit is fully consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause. In *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993), the Second Circuit held that "[i]n the context of an alleged RICO predicate act of mail fraud, we have stated that to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on." Petitioners neither cite nor distinguish *Metromedia*.

The cases cited by Petitioners do not support a conclusion that the Second Circuit and Fifth Circuit are in conflict on this issue. In *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996), the Second Circuit addressed the enterprise requirement of RICO. The court did not hold that civil RICO plaintiffs need not plead reliance. In *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1299-1300

(2d Cir. 1990), ratepayers alleged that utility defendants had defrauded a public service commission. The court affirmed the dismissal of plaintiffs' claims on the basis that plaintiffs could not even show reliance by the public service commission. *Id.* at 1312. The court did not reach the issue of reliance by the plaintiff ratepayers. *Id.* at 1311-12. *Cement and Concrete Workers District Council Welfare Fund v. Lollo*, 148 F.3d 194 (2d Cir. 1998), is not a RICO case at all, but instead deals with ERISA and New York state law. Ironically, even this case, as off base as it is, requires reliance. *Id.* at 196 (because "the district court did not find that plaintiffs had proven their reliance on [defendant's] misrepresentations and because there is no evidence they did so rely, [defendant] is not liable under either ERISA or New York law.").

Petitioners' citation to *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs. L.P.*, 985 F.2d 102 (2d Cir. 1993), in support of their argument that a conflict exists between the Second and Fifth Circuits, is baffling. In *Standardbred*, the horseowners alleged in their affidavits that, "in the fraudulently induced belief that racing would continue, plaintiffs purchased, relocated and reconstructed capital equipment for use at the track, and designed their purchases and training of horses with the intent to race them at the track." *Id.* at 105. The Second Circuit reversed the dismissal of plaintiffs' RICO claims, because, "[i]f as plaintiffs contend, defendants continually misrepresented that they would not close the track and were not interested in developing the property, defendants fraudulently induced plaintiffs to take actions and make expenditures[.]" *Id.* This holding is completely consistent with the Fifth Circuit's decisions in this case and in *Summit*.

Two other cases cited by Petitioners also involve standing issues under RICO, and do not address reliance requirements at all. *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000); *Abraham v. Young & Rubicam, Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S. 816 (1996).

2. The Third Circuit Requires Reliance.

The Third and Fifth Circuits are consistent in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause. In *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 741 (3d Cir. 1996), the plaintiff filed suit against milk suppliers, alleging that the defendants engaged in a mail and wire fraud scheme to overcharge for dairy products in violation of civil RICO. The Third Circuit affirmed the dismissal of plaintiff's RICO claims for failure to plead and prove reliance. *Id.* at 746-47.

The cases cited by Petitioners do not support their argument that a conflict exists between the Third and Fifth Circuits. *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 918 (3d Cir. 1999), *cert. denied, mot. granted*, 528 U.S. 1105 (2000), is a putative class action by seven welfare funds against eight tobacco companies, seeking recovery for the funds' costs of treating their participants' smoking-related health costs. *Steamfitters* is not a detrimental reliance case. As expressly stated by the Third Circuit: "We need not focus on many of the necessary elements of these claims, such as the details of the conspiracy and the fraud, whether the Funds (or others) reasonably relied on the fraud, the

predicate acts for the RICO claims, etc. Rather, we focus on the issue of proximate cause . . . an element we find lacking in plaintiffs' case." *Id.* at 921.

The second case cited by Petitioners is even less on point. *Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc.*, 847 F.2d 1052 (3d Cir. 1988), is inapplicable to a detrimental reliance requirement argument. *Environmental* involved commercial bribery, which does not require reliance, and for which a reliance requirement would make no sense. The Third Circuit did not consider in that case whether detrimental reliance is a proximate cause requirement in civil RICO claims predicated on mail fraud. *See id.*

3. The Fourth Circuit Requires Reliance.

The Fourth Circuit is consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause.

Inexplicably, Petitioners do not cite *Brandenburg v. Seidel*, 859 F.2d 1179, 1188-90 (4th Cir. 1988), in which the Fourth Circuit held that civil RICO plaintiffs whose claims are predicated on mail or wire fraud must plead that they detrimentally relied on fraudulent statements, and that the statements were the proximate cause of their injury.

The Fourth Circuit consistently has followed *Brandenburg*. Petitioners cite *Chisholm v. Transouth Finan. Corp.*, 95 F.3d 331, 339 (4th Cir. 1996), for a cryptic reference to "systemic reliance on legality of process." Petition at 9

n.16. In *Chisholm*, however, the Fourth Circuit specifically remanded on the basis that the plaintiffs were entitled to amend their complaint to allege reliance. *Id.* at 338. On review of the subsequent dismissal of the amended complaint, the Fourth Circuit reversed and remanded, holding that "the third amended complaint sufficiently pleads reliance." *Chisholm v. Transouth Finan. Corp.*, No. 97-1970, 1998 WL 709311 at *2 (4th Cir. Oct. 5, 1998).

The other Fourth Circuit cases cited by petitioners also fail to support an argument that there is a conflict with the decision of the Fifth Circuit's *Dixon* decision. *Mid-Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (citing *Brandenburg*, the court remanded the case for resolution of the reliance issue), *cert. denied*, 513 U.S. 931 (1994); *John C. Holland Enterprises, Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F.Supp. 1242, 1249 (E.D. Va.), *aff'd*, 829 F.2d 1120 (4th Cir. 1987) (addressing whether the plaintiff had properly pled the elements of the predicate acts of a RICO claim).

4. The Eighth Circuit Requires Reliance.

The Eighth Circuit is consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause.

In *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994), the owner of a building filed RICO claims against the manufacturer of

fireproofing materials, but did not allege "any misstatements or misrepresentations" or that "it relied on any misrepresentations in purchasing the building." The Eighth Circuit agreed with the district court that the plaintiff lacked standing, because it failed to show "it detrimentally relied on any of the alleged misrepresentations in its purchase of the building[.]" *Id.* at 1287.

Petitioners do not even try to distinguish *Appletree.* Instead, they cite to Eighth Circuit cases which are not on point. *Atlas Pile Driving Co. v. DiCon Finan. Co.*, 886 F.2d 986, 990-93 (8th Cir. 1989), focused on the statutory requirements for mail and wire fraud as predicate acts. As stated in *Summit,* however, the issue of the statutory requirements for mail or wire fraud is "distinct" from proximate cause requirements for civil RICO plaintiffs. *Summit,* 214 F.3d at 559.

Similarly, Petitioners' reliance on *United HealthCare Corp. v. American Trade Ins. Co.*, 88 F.3d 563 (8th Cir. 1996), is less than apt. In *United HealthCare,* the Eighth Circuit addressed whether detrimental reliance is a statutory requirement of *criminal* mail or wire fraud, not whether reliance is necessary to prove proximate cause in a *civil* RICO case. Petitioners' citation to *Bieter Co. v. Blomquist,* 987 F.2d 1319, 1325-27 (8th Cir.), *cert. denied,* 510 U.S. 823 (1993), is equally misplaced. *Bieter* is a bribery case; thus, the court neither mentioned nor considered detrimental reliance as a requirement to show proximate cause. Petitioners' citation to *Newton v. Tyson Foods, Inc.*, 207 F.3d 444 (8th Cir. 2000), does not support a conflict argument, because it neither mentioned nor addressed reliance. Instead, the *Newton* court held that the plaintiffs lacked

standing because their injury was too "attenuated" and remote. *Id.* at 447.

5. The Ninth Circuit Requires Reliance.

The Ninth Circuit is consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause.

Petitioners cite *Oregon Laborers-Employers Health and Welfare Fund v. Philip Morris, Inc.*, 185 F.3d 957, 961 (9th Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000), but as the case name implies, this is another case in which welfare funds sued tobacco companies (this time six welfare plans sued eight tobacco companies). The Ninth Circuit merely concluded that the welfare funds could not recover for harm suffered by the plans' participants because "the 'remoteness' test weighs in favor of barring plaintiffs' action[.]" *Id.* at 984.

Petitioners fail to cite or distinguish or analyze *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999), a case directly on point. In *Forsyth*, the Ninth Circuit expressly stated that, to maintain a civil RICO claim based on mail or wire fraud, plaintiffs must "establish that they relied on misrepresentations . . . and that these misrepresentations directly caused them a concrete financial loss." *Id.* at 1481. Further, Petitioners ignore *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (plaintiff's mail fraud allegations were "without foundation" because it could not present evidence of reliance).

6. The Eleventh Circuit Requires Reliance.

The Eleventh Circuit is fully consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail fraud to show proximate cause. Petitioners' argument that the Eleventh Circuit is in conflict with the Fifth is disingenuous, at best.

Petitioners grudgingly concede that the Eleventh Circuit has required reliance in civil RICO cases alleging mail or wire fraud. In *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998), the Eleventh Circuit denied plaintiff's civil RICO claims because the alleged misrepresentations were made to third parties, not plaintiff, and therefore reliance was lacking. The Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). Petition at 10 n.16.

Petitioners mistakenly cite *All Care Nursing Serv. v. High Tech Staffing*, 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999), in support of their argument that the Eleventh Circuit is in conflict with the Fifth Circuit, but the case clearly stands for the opposite proposition. In *All Care*, the court stated that reliance must be shown by a plaintiff to prove "he was injured by reason of the RICO defendant's deception and fraud." *Id.* at 745 n.10 (citing *Pelletier*).

Petitioners cite to *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1398-1403 (11th Cir. 1994), another bribery case that did not, and did not need to, address "reliance" as a proximate cause requirement. It is notable, however, that *Cox* cited to *Pelletier* with approval. *Cox*, 17 F.3d at 1396.

Petitioners' citation to *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), 967 F.2d 1483 (en banc) (11th Cir.), *cert. denied*, 506 U.S. 1021 (1992), is equally unavailing. As in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1299-1300 (2d Cir. 1990), analyzed above, *Taffet* involved ratepayers' claims that the defendants defrauded public utility commissions into agreeing to higher rates, harming the consumers. *Taffet*, 930 F.2d at 856. The court never addressed the reliance requirement; on reconsideration, the Eleventh Circuit rendered its decision under an application of the "filed rate doctrine," clearly irrelevant to Petitioners' conflict argument. *Taffet*, 967 F.2d at 1494.

7. The District of Columbia is Not in Conflict with the Fifth Circuit.

The District of Columbia has not addressed the issue whether detrimental reliance is required in civil RICO actions predicated on mail or wire fraud to show proximate cause. The case cited by petitioners, *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168 (D.C. 2000), involved the RICO direct injury requirement, not whether a showing of reliance is required by civil RICO plaintiffs. There is, therefore, no conflict between the decision of the Fifth Circuit and the District of Columbia.

II. Petitioners' Argument Concerning the Fifth Circuit's "Ordinary Prudence Standard for Scheme to Defraud" Does Not Present a Meaningful Conflict Among Circuit Courts.

The district court's judgment dismissing Petitioner's RICO claims, and the Fifth Circuit's judgment affirming dismissal, focus on a single, straight-forward issue: were Petitioners obligated to allege reliance on Defendants' purported mail or wire fraud in order to state a civil RICO claim based on predicate acts of mail or wire fraud? Rather than focus on this simple issue, Petitioners apparently argue in Section A of their Petition either that no prudence should be required of any plaintiff to find an actionable "scheme to defraud," or that the plaintiff's prudence should be subjectively evaluated. This Court should deny certiorari on this issue for two reasons: (1) the Fifth Circuit's purported "ordinary prudence standard for scheme to defraud" was not raised below; and (2) the Fifth Circuit's so-called "objective standard" for evaluating a plaintiff's prudence is irrelevant to the outcome of this case.

A. Petitioners' Argument Concerning the "Ordinary Prudence Standard for Scheme to Defraud" Was Not Raised Below.

On July 21, 2000, the district court ordered all parties to brief the issue of whether subject matter jurisdiction existed for Petitioners' suit. App. at 19. The sole substantive legal issue concerning RICO addressed by the district court was whether these plaintiffs must plead reliance in order to state a civil RICO claim based on mail fraud. App. at 4, 24, 28, 31. In dismissing Petitioners' RICO

claims, the district court held the Petitioners failed to state a claim under RICO because they conceded that they did not rely on Defendants' alleged misrepresentations or omissions. App. at 31 (quoted at 2 above).

The district court's dismissal of Petitioners' RICO claims was confined to this narrow, uncomplicated issue. On appeal, the Fifth Circuit limited its analysis to the sole issue of whether Petitioners must have alleged reliance to establish a civil RICO claim based on mail fraud predicate acts. App. at 4, 5, 7.

Neither the district court nor the Fifth Circuit made any mention of the Fifth Circuit's supposed "ordinary prudence standard for proving a scheme to defraud," or how this "objective standard" applied in this case. Further, the briefs submitted by the parties do not reference such a so-called "objective standard" for determining a plaintiff's "ordinary prudence" in a scheme to defraud.

It is well-established that this Court generally does not consider issues raised for the first time in a petition for certiorari.[12] *See Glover v. United States*, 531 U.S. 198,

---

[12] Petitioners also advance, for the first time in their petition, a puzzling argument that the "Fifth Circuit's requirement of inducement by the perpetrator and detrimental reliance by the victim ([so-called] 'convergence')" is in conflict with the First Circuit. Petition at 9-11. The cases cited by Petitioners are criminal RICO cases dealing with a requirement that the victim who suffered the loss must have been the intended target of the perpetrator. *Id.* at 11 n.18. There are no facts in this case to which a "convergence" theory is applicable. In any event, the Petitioners' "convergence" theory was never raised below, was never mentioned by the courts below, and is irrelevant to the narrow issues before the Court.

205 (2001) ("We need not describe the arguments in great detail, because . . . they were neither raised in nor passed upon by the Court of Appeals. In the ordinary course we do not decide questions neither raised nor resolved below."). *See also United States v. Ortiz*, 422 U.S. 891, 898 (1975) (argument raised for first time in petition for certiorari not considered); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977) ("Not having been raised in the District Court, that issue is not before us."). Accordingly, certiorari should be denied on Petitioners' newly created attempt to raise an issue not even briefed, much less discussed, below.

B. Petitioners' Argument Concerning the Fifth Circuit's "Ordinary Prudence Standard for Scheme to Defraud" Is Irrelevant.

Petitioners' argument is also completely irrelevant to determining whether the Fifth Circuit correctly affirmed the district court's dismissal of the civil RICO claims. The district court dismissed Petitioners' civil RICO claims simply because they failed to plead or prove reliance on the alleged mail or wire fraud, and the Fifth Circuit affirmed on this basis. *See* App. at 4, 5, 7, 24, 28-31. Even if this Court were to resolve an alleged "conflict" in the circuits concerning whether an "objective standard" should be applied to evaluate a plaintiff's "ordinary prudence" in a "scheme to defraud," this would do nothing to alter the result reached by the courts below, and would avail the Petitioners nothing.

1. The "Ordinary Prudence Standard for Scheme to Defraud" Was Not Mentioned by the Lower Courts in this Case.

Petitioners argue that the Fifth Circuit has improperly formulated the "objective standard" for evaluating a "scheme to defraud" by requiring that such a scheme be calculated to deceive a person of "ordinary prudence." Petition at 7-8. Notably, Petitioners do not claim the Fifth Circuit misstated, or even referred to, the "ordinary prudence standard for scheme to defraud" in *this* case.

Rather, Petitioners cite solely to *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954), *cert. denied*, 348 U.S. 828 (1954), a case decided nearly half a century ago, and long before RICO was even a glimmer in the eye of Congress. *See* Petition at 3, 7 n.11, 16. Petitioners then cite cases from other circuits that allegedly formulate a standard different from the Fifth Circuit's 1954 *Silverman* decision. Petition at 8. Petitioners assert that the other circuits reject the Fifth Circuit's "ordinary prudence," or "objective standard," and hold that it is sufficient if a defendant's "scheme to defraud" was calculated to deceive a "gullible" or "dull" person. *See* Petition at 8 n.13.[13] Irrespective of whether there is an actual conflict

---

[13] Petitioners cite several cases in support of their argument that there is an intercircuit conflict regarding the "ordinary prudence standard for scheme to defraud," none of which are relevant here. *See* Petition at 8 n.12, 13. The "conflict" established by these cases is illusory. Indeed, of all of those cited cases, only two even rate a mention by Petitioners in subsequent footnotes of their Petition. *See United States v. Biesiadecki*, 933 F.2d 539 (7th Cir. 1991), Petition at 17 n.36, and *United States v. Coffman*, 94 F.3d 330 (7th Cir. 1996), *cert. denied*, 520 U.S. 1165

between other circuits and the 1954 *Silverman* case concerning an "objective" versus "subjective" versus "non-existent" standard to measure a plaintiff's prudence in a "scheme to defraud," this issue played no part in the lower court's decision.

2. More Is Required for Civil RICO Liability.

The lower courts correctly separated the issue of whether a mail fraud scheme could have existed here from the issue of whether more is required to entitle Petitioners to *civil damages* under RICO:

> [T]he fact remains that mail fraud schemes (and for that matter, all manner of crimes) can be occurring around us everyday, and while their mere existence provides the Government a right to prosecute the perpetrators, it does not provide a private civil cause of action for an individual plaintiff until the fraud has actually injured him or her. For this reason, reliance is necessary to establish proximate cause in a civil RICO action based on mail fraud.

App. at 28.

The above excerpt from the district court's opinion demonstrates that Petitioners' allegations about an

---

(1997), Petition at 18 n.37. Interestingly, the majority of the cases cited by Petitioners are irrelevant criminal cases, and only one of those even involved criminal RICO claims (*Biesiadecki*). Criminal cases are completely irrelevant to the resolution of this case, as the lower courts' sole ground for dismissing Petitioners' civil RICO claims was that Petitioners failed to demonstrate that Defendants proximately caused Petitioners' alleged *civil* RICO damages. *See* App. at 4, 5, 7, 31.

alleged mail fraud scheme are actually irrelevant to the limited issues before this Court. The district court ruled, and the Fifth Circuit affirmed, that *even if* defendants participated in a scheme to defraud, Petitioners' claims are still deficient, because they have failed to allege a civil RICO injury proximately caused by their "reliance on the predicate mail fraud." App. at 9.

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991), *cert. denied*, 502 U.S. 855 (1991), a case cited in Petitioners' brief (from a circuit the Petitioners erroneously contend is in conflict with the Fifth Circuit), reinforces the distinction made by the district court in this case and highlights the irrelevance of Petitioners' argument. In *Pelletier*, the plaintiff alleged that the defendant violated RICO through the predicate acts of mail and wire fraud. *Id.* at 1498. The Eleventh Circuit then distinguished between the showing necessary to demonstrate a violation of the federal mail and wire fraud statutes and the further showing needed to establish civil RICO liability:

> When a private plaintiff relies on a violation of the mail or wire fraud statutes as a predicate act for civil RICO, he faces an additional hurdle before he can obtain recovery: He must show not only that the mail and wire fraud statutes have been violated, but also that he has suffered injury as a result of the violation. . . . Section 1964(c), as interpreted by the Supreme Court and lower courts, thus imposes a proximate cause requirement: the plaintiff's injury must have been proximately caused by the commission of the predicate acts. . . .
>
> This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have

> been a target of the scheme to defraud *and must have relied to his detriment on misrepresentations made in furtherance of that scheme.*

Id. at 1499-1500 (citations omitted) (emphasis added).

In this case, the district court and the Fifth Circuit, just like the Eleventh Circuit in *Pelletier*, held that even if Petitioners' pleadings adequately set forth the commission of a predicate act by defendants through their participation in a mail fraud scheme to defraud Petitioners, Petitioners did not state a civil RICO claim, because they failed to allege they were injured as a proximate result of this alleged scheme – *i.e.*, that they relied on the defendants' alleged misrepresentations or omissions. App. at 4, 5, 7, 9, 24, 28-31.[14]

The district court and the Fifth Circuit held that a plaintiff must overcome two hurdles in order to state a claim under civil RICO based on mail fraud predicate acts: (1) the plaintiff must show the defendant committed mail fraud; and (2) the plaintiff must show that his reliance on this predicate act proximately caused his damages. The district court and the Fifth Circuit found that Petitioners did not satisfy the second hurdle, because they admitted "that they did not detrimentally rely on any misrepresentations or omissions in defendants' mail fraud." App. at 4, 5, 7, 24, 28-31.

---

[14] The Eleventh Circuit held, as did the lower courts in this case, that "even if [the defendant] did participate [in a scheme to defraud] as alleged, a jury could not find that [the plaintiff] was injured by reason of an act committed in furtherance of that scheme." *Id.* at 1500.

Thus, the alleged inter-circuit conflict regarding the correctness of applying an "objective standard" to evaluate a plaintiff's prudence for finding a scheme to defraud is irrelevant, as resolution of that "conflict" affords Petitioners nothing. Petitioners can only succeed if they successfully attack the judgments of the district court and the Fifth Circuit with respect to the second hurdle; whether they relied on the mail fraud predicate acts. Accordingly, certiorari should be denied on this issue.

3. The Distinction between an Objective Standard and Other Standards is Irrelevant.

Petitioners' argument is irrelevant for another reason. Petitioners argue that the Fifth Circuit's "ordinary prudence standard for a scheme to defraud" is erroneous, because a scheme to defraud exists even if a defendant's misrepresentations/omissions are only calculated to deceive a "gullible" or "dull" person. *See* Petition at 7-8. Petitioners attack the Fifth Circuit's purported "objective standard." While Petitioners' arguments are muddled, they seem to make two arguments. The first appears to be that an objective evaluation of a plaintiff's prudence/reliance is not required, because no reliance is needed to state a claim. This, of course, is the substance of Petitioners' second argument in support of their Petition for Certiorari here, as in the *Summit* petition, and is addressed in the prior section of this opposition.

Petitioners' second argument may be that a plaintiff's prudence, or reliance, should not be judged objectively, but rather subjectively, so as to include dull or gullible

plaintiffs who subjectively relied on a defendant's misrepresentation. This argument is also unavailing, because there was no reliance at all by Petitioners in this case. Consequently, there was no reliance to judge, by either an objective or subjective standard. The subjective gullibility, or objective prudence, of an alleged civil RICO victim could only be relevant if that victim actually relied on a defendant's mail or wire fraud, because a defendant would argue that plaintiff's subjective (gullible) reliance was unreasonable.

Here, by contrast, Petitioners have not alleged any reliance, either subjective or objective. Petitioners have admitted that they did not rely on any mail or wire fraud, and the rulings below were based on this admission. *See* App. at 4, 5, 7, 24, 28-31. In fact, Petitioners' primary argument in this case, as advanced in the courts below, is that reliance is not necessary to support a civil RICO claim. As stated above, the circuit courts uniformly require reliance to show proximate cause in a civil RICO claim based on mail or wire fraud. Accordingly, whether an intended RICO victim's prudence must be judged by an objective standard or a subjective standard is irrelevant to the issues involved in this case.

If the resolution of a conflict is irrelevant to the ultimate outcome of a case before this Court, certiorari should be denied. Robert L. Stern, et al., *Supreme Court Practice*, § 4.4, at 173 (7th ed. 1993) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)). This Court has often denied certiorari when an apparent conflict is not relevant to the outcome of a case. For example, in *River Road Alliance v. Corps of Eng'rs of the United States*, 475 U.S. 1055 (1986), the Supreme Court denied certiorari, even though,

as pointed out in the Seventh Circuit's opinion below, there was a circuit split concerning the standard of review of a federal agency's decision not to prepare an environmental impact statement. *River Rd. Alliance v. Corps of Engineers of the United States*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986). As Justice White noted in an earlier dissent from denial of certiorari, there was a clear conflict between the circuits on this issue. *See Gee v. Boyd*, 471 U.S. 1058 (1985). In *River Road Alliance*, however, the conflict was not relevant to the petitioner because, as the Seventh Circuit observed, it would lose regardless of the standard applied. *River Rd. Alliance*, 764 F.2d at 449. Certiorari should similarly be denied in this case, because Petitioners would also lose regardless of whether an objective or subjective "prudence" standard applies.

Greber v. United States, 474 U.S. 988 (1985), is another case where a circuit court conflict was not relevant to a petitioner's case. The question that petitioner wanted the Court to resolve was whether the issue of materiality, in prosecutions for making false statements in a matter within the jurisdiction of a department or agency of the United States, should be submitted to the jury or decided by the judge. A majority of the circuits, including the Third, where the case originated, believed the issue should be decided by the judge rather than the jury. *See Greber v. United States*, 760 F.2d 68, 72 (3d Cir. 1985), *cert. denied*, 474 U.S. 988 (1985). The Ninth Circuit had stated that the issue should be decided by the jury. *See United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979). However, the Ninth Circuit had also stated that failure to submit the issue to the jury was not reversible error. *Id.* The

petitioner thus had no chance for reversal under the Ninth Circuit standard and would have lost in all of the other circuits. Certiorari was properly denied, as the resolution of the inter-circuit dispute presented did not affect the outcome of the case.

In this case, even assuming, *arguendo*, that Petitioners have correctly identified a circuit split on whether the "objective standard" for judging a plaintiff's "prudence for scheme to defraud," resolution of such an inter-circuit dispute would not affect the outcome of this case. Plaintiffs still failed to plead or prove reliance in support of their civil RICO claims based on mail or wire fraud. Petitioners' alleged circuit split is nothing more than a red herring, and their Petition should be denied.

III. Certiorari Should Be Denied in this Case Because It Was Correctly Decided and Does Not Warrant the Court's Review.

Petitioners' opinion that reliance is not necessary to prove proximate cause cannot override the circuits' jurisprudence which has consistently and repeatedly held otherwise. For more than ten pages of their pleading, Petitioners make the same broad policy arguments as urged in the *Summit* petition in favor of a more expansive reading of RICO, unfettered by any supporting circuit court authority. The fact remains, however, that the unpublished – per curiam decision rendered in this case followed the jurisprudence established in the Fifth Circuit and every other circuit which has addressed the issue.

This decision below turns on its own facts, and it will affect few others than these litigants. The *Dixon* court

decided this case correctly, relying on *Summit*, which the Court has declined to review. Moreover, Petitioners' claims fall squarely within the province of Louisiana state law and should, therefore, be resolved by Louisiana courts.

CONCLUSION

Every circuit court to address the issue, including the Fifth Circuit, has consistently held that civil RICO plaintiffs must plead and prove detrimental reliance upon the alleged mail or wire fraud in order to establish proximate causation between a RICO violation and injury. There is, therefore, no conflict among the circuits on this issue. Petitioners' "ordinary prudence standard" is not properly before this Court, because it was not raised below, it is just another version of the reliance issue, and it is

irrelevant to the outcome of this case. For these reasons and because the Fifth Circuit correctly decided this case, certiorari should be denied.

Respectfully submitted,

ANTHONY J. ROLLO
DAVID S. WILLENZIK
MICHAEL H. RUBIN
McGLINCHEY STAFFORD LANG
A PROFESSIONAL LIMITED
LIABILITY COMPANY
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Respondents American National Insurance Company, Chrysler Financial Corporation, and Nissan Motor Acceptance Corporation

SCOTT D. DANIEL
GREER, HERZ & ADAMS, LLP
One Moody Plaza
18th Floor
Galveston, TX 77550-7998
Attorney for Respondent American National Insurance Company

(3)

No. 01-0215

Supreme Court, U.S.
FILED
SEP 17 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARION DIXON, *ET AL.*,

Petitioners,

v.

FORD MOTOR CREDIT COMPANY, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

Of Counsel
DAWN ADAMS WHEELAHAN
650 Poydras St., Suite 1550
New Orleans, LA 70130
(504) 522-0495 (Telephone)
(504) 581-1624 (Facsimile)

TERRY RICHARDSON, JR.
DONNI E. YOUNG
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
1555 Poydras St., Suite 1700
New Orleans, LA 70112
(504) 636-3480 (Telephone)
(504) 636-3499 (Facsimile)

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556-0780
(219) 631-5717 (Telephone)
(219) 631-4197 (Facsimile)
Blakey.1@nd.edu (E-mail)
Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT OF REPLY 1

I. A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS EXISTS 1

II. THE ISSUES RAISED ARE BEFORE THE COURT 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Fasulo v. United States, 272 U.S. 620 (1926) 2

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 4, 7

McNally v. United States, 483 U.S. 350 (1987) 3

Summit Properties, Inc. v. Hoechrist-Celanese Corp., 214 F.3d 556 (5th Cir.), *cert. denied*, 120 S. Ct. 896 (2001) 4, 5

United States v. Turkette, 452 U.S. 576 (1981) 1

STATUTES

18 U.S.C. § 1346 3

18 U.S.C. §§ 1961 *et seq.* 1

18 U.S.C. § 1964(c) 4, 6

ARGUMENT OF REPLY

Respondents American National Insurance Co., Chrysler Financial Corp., and Nissan Motor Acceptance Corp. restate Petitioners' issues, seeking to argue through that restatement that a conflict between the circuits is *not* presented by Petitioners' brief and the questions raised in it are *not* before the Court. As such, they make two broad arguments. Taken together, or singularly, the arguments do not undermine the force of Petitioners' Petition, which ought to be granted to resolve significant, reoccurring, and conflicting issues among the circuits on "scheme to defraud" and "proximate cause" in the application of an important federal statute.

I. A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS EXIST

Respondents first seek to restate the facts of the Petition by characterizing them as a "garden variety" fraud, which is not properly cast as a RICO.

That argument, which misstates the facts, belongs, if anywhere, before Congress. In fact, Congress "federalized" properly plead RICO frauds, even though defendants like to call them "garden variety," as if that catch phrase were any more self-defining than "organized crime." RICO applies to "any person" who "violates" its text, however others might label him or her or his or her conduct for rhetorical purposes. 18 U.S.C. §§ 1961 *et seq.* In brief, absent constitutional matters, which are not present here, that legally ends the matter. *Turkette*, 452 U.S. at 587.

Respondents next seek to restate the issues raised by Petitioners to limit them to a single question, "detrimental reliance." Respondents ignore the record before the lower courts, and, ironically, argue that the Petition improperly "characterizes" precedent, while they misstate the scope of the relevant precedent themselves in their own arguments. Only as so restated, and so misstated, by the Respondents do the square conflicts between the circuits, even arguably, fade away.

As Petitioners' brief shows, and Respondents conveniently ignore, "scheme to defraud," under RICO, encompasses, unquestionably, a wide variety of illegal conduct, including (1) face-to-face, misrepresentation frauds, *but not limited to*, face-to-face misrepresentation frauds; the phrase also includes, at least, (2) material omissions, (3) bribery, (4) forms of theft (embezzlement, etc.), (5) breaches of fiduciary responsibility (insider trading by broker-dealers, etc.), (6) tax frauds (failure to pay different kinds of taxes, etc.), (7) bid rigging, (8) check kiting, and (9) a variety of other forms of cheating. Indeed, this Court only excludes from "scheme to defraud" violence. *Fasulo*, 272 U.S. at 628.

Moreover, these various forms of "schemes to defraud" do not *all* involve misrepresentations and may – *or may not* – involve face-to-face transactions; they may also, most significantly, and as Respondents conveniently ignore, involve a variety of forms of fraudulent conduct and take place in complex multiparty schemes.[1] In short,

---

[1] They are not even limited to "schemes to defraud" that seek to obtain "property"; they include such schemes that seek

Respondents would like this Court to focus solely on face-to-face misrepresentation fraud, where detrimental reliance may be the general rule, to the exclusion of all other forms of "scheme to defraud." Respondents would like this Court to ignore, and exclude liability for, *omission* fraud – the basis of Petitioners' claim – where a *universal* requirement of detrimental reliance is simply unintelligible (How can one rely on what does not exist, what has been omitted?), or as the Respondents observe, "would make no sense" (Brief in Opposition at p.12), and is not required by the circuits, as Petitioners' brief correctly summarizes the law.

Respondents are engaged in the oldest trick of the magician: they seek to focus the attention of the Court on one facet of a multifaceted problem and away from the problem itself; they hope to fool this Court by legal sleight of hand. Diverting attention from real conflicts within the entire set ("scheme to defraud"), the Respondents argue that no conflict is present within a subset of "scheme to defraud"(face-to-face misrepresentation fraud). They then seek to project that lack of conflict on a different facet of "scheme to defraud," that is, omission fraud, and to treat it as if the law in that area were, or should be, identical to face-to-face misrepresentation fraud. Respondents do not, however, examine Petitioners' extensive analysis demonstrating that the two areas are, in fact, properly treated differently by controlling precedent in the other circuits, the states, and this Court, not only under RICO, but other relevant statutes, including

---

the deprivation of "honest services." 18 U.S.C. § 1346 (setting aside *McNally v. United States*, 483 U.S.350 (1987)).

antitrust, on which RICO was modeled. Respondents' long, circuit by circuit review of the supposed lack of conflict within the narrow subset of face-to-face representation fraud suffers from this fundamental defect; it would serve little useful purpose for this reply brief to go into Respondents' analyses. Each suffers from the same defect. Petitioners are confident that this Court will be not fooled by Respondents' rhetorical trick.

Under this Court's teaching in *Holmes*, claims for relief under RICO, of course, require a "proximate cause" ("by reason of") relation between their "injury" to "business or property" and the defendant's conduct ("violation"). 18 U.S.C. § 1964(c). But nothing in *Holmes*, contrary to the Fifth Circuit's *Summit* decision, and Respondents' position, says anything about "detrimental reliance" as a *universal* requirement of "proximate cause" for *all* forms of "scheme to defraud." In fact, *Holmes* only dealt with the relation between "near" and "remote" among separate claims for relief. 503 U.S. at 265-68. That aspect of "proximate cause," and only that aspect, was what this Court considered; other aspects of "proximate cause" were neither briefed nor argued, and therefore, were not decided in *Holmes*. As in the case of the Fifth Circuit, Respondents would like to slip from one meaning of "proximate cause" to another meaning of "proximate cause" without this Court's noticing it or any undertaking by them of the necessary treatment of intervening and differing policy concerns.

Accordingly, when Respondents cite face-to-face misrepresentation cases from the various circuits to show that no conflict on detrimental reliance is present, they misstate the relevant precedent, and they seek to confuse

this Court by limiting its focus to a subset of "scheme to defraud" (face-to-face misrepresentation fraud), treating it as if it were the set (all forms of "scheme to defraud"). In fact, the conflict raised by this Petition is, not within the subset, as Respondents would have it, but between the subset and the set,[2] as Petitioner's brief amply demonstrates.[3] That conflict merits this Court's due attention. Respondents' legal sleight of hand ought not work.

---

[2] Respondents also seek to minimize the character of the conflict by pointing out that the Fifth Circuit's decision is unpublished, an argument that is easily countered: (1) Petitioners seek to review the rule of law announced in the case; its precedential character is irrelevant on its status as an application of a legal rule. In addition, if handing down an unpublished decision inevitably precluded its review, the lower courts could, by that tactic alone, always circumvent this Court's plenary power of review. The practice of not taking on certiorari unpublished opinions is not a jurisdictional rule, but a practice of prudence. To maintain this Court's ultimate role of superintendence over the entire federal system, this Court *must*, on appropriate occasions, take for review unpublished opinions; this decision is, therefore, an apt decision for review precisely because it is unpublished.

[3] To be sure, this Court denied review of *Summit*, but nothing can be concluded from that denial. The conflict identified in *Summit* (between "proximate cause" in face-to-face and in complex third party frauds) is not identical with this Petition (between "proximate cause" in face-to-face representation and face-to-face omission fraud). The underlying issues, however, are related, and as the *Summit* rule is mindlessly applied across the full landscape of "scheme to defraud," each application beyond its core application to face-to-face representation fraud compounds the original error and demonstrates again conflicts between the circuits. That is the only relevancy of *Summit*.

II. THE ISSUES RAISED ARE BEFORE THE COURT

Respondents ignore those parts of the record that are inconsistent with their effort to narrow the issues before the Court, so as to avoid Petitioners' identification of substantial inter-circuit court conflict. Petitioners were careful to draw to this Court's attention the crucial events that preceded the District Court's dismissal of Petitioners' claims for relief. Petition at p.5 n.9. The District Court specifically referred to its own prior decision involving Petitioners' counsel in cognate litigation. Counsel was, therefore, well-aware of the standards that this judge applied in that litigation and might well apply to Petitioners' claims for relief in this litigation.

Accordingly, each of the issues raised in this Petition was put in question by the course of the litigation that brings this Petition before this Court. No rule of law or prudence necessarily precludes review of what really happened. Petitioners' counsel carefully drafted their claim for relief as a material omission, rather than misrepresentation, precisely to avoid the impact of those unduly circumscribed standards. Respondents are disingenuous now to suggest that this litigation only raises "proximate cause," and not also those other aspects of the litigation that were squarely put in issue by counsel.

Litigation does not take place in a vacuum; Respondents offer no reason in law or policy that establishes that review ought to take place in a vacuum. This Court can hardly consider the issue of "proximate cause" between "violation" and "injury to business or property" within 18 U.S.C. § 1964(c) without taking a fair look at both ends of the equation. How to define "violation" is crucial on

how to define "nexus," as Justice Scalia so well notes in his concurrence in *Holmes* itself. 503 U.S. at 288. Respondents themselves concede that "ordinary prudence" is "just another version of the reliance issue." Brief in Opposition at 29. Accordingly, each of the issues raised by this Petition, which are, in fact, inextricably intertwined, may properly be considered by this Court on review.

CONCLUSION

For the reasons set forth hereinabove, as well as those set forth in the Petition, the Petition should be granted.

Respectfully submitted,

Of Counsel
DAWN ADAMS WHEELAHAN
650 Poydras St., Suite 1550
New Orleans, LA 70130
(504) 522-0495 (Telephone)
(504) 581-1624 (Facsimile)

TERRY RICHARDSON, JR.
DONNI E. YOUNG
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
1555 Poydras St., Suite 1700
New Orleans, LA 70112
(504) 636-3480 (Telephone)
(504) 636-3499 (Facsimile)

G. ROBERT BLAKEY
Counsel of Record
NOTRE DAME LAW SCHOOL
Notre Dame, IN 46556-0780
(219) 631-5717 (Telephone)
(219) 631-4197 (Facsimile)
Blakey.1@nd.edu (E-mail)
Attorney for Petitioners